Menteri Kewangan & Ors v Diler Demir Celik Endustru Ve Ticaret AS (also known as Diler Iron and Steel Co Inc)

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(F)-8–03 OF 2024(W)
ZABARIAH YUSOF, NORDIN HASSAN AND ABU BAKAR JAIS FCJJ
25 SEPTEMBER 2025

International Trade and Industry — Dumping of goods — Countervailing and Anti-Dumping Duties Act 1993 ('the Act') — First appellant imposed anti-dumping duties against respondent — Whether s 17 of the Act must be read with s 18 of same to ensure fair comparison between export price and normal value which was normally at ex-factory level — Whether s 17(2) and 17(3) of the Act were applicable for determination of export price when export price had been determined based on s 17(1) of same and no issue arose that there was no export price or that it appeared that export price was unreliable — Whether in making price comparison pursuant to s 18 of the Act and reg 32 of Countervailing and Anti-Dumping Duties Regulations 1994 between export price and normal value, adjustment had to be made even though no cost was borne by respondent in domestic market with respect to duty drawback — Countervailing and Anti-Dumping Duties Act 1993 ss 17 & 18

The respondent was a company incorporated in the Republic of Turkey that engaged Diler Dis Ticaret Anomin Sierkti ('DDT'), a related trading company to export steel reinforcing bar ('Rebar') into Malaysia. The Malaysian Steel Association, on behalf of the domestic industry, submitted both a confidential and non-confidential anti-dumping petition pursuant to ss 4 and 20 of the Countervailing and Anti-Dumping Duties Act 1993 ('the Act') to the Minister of International Trade and Industry ('the second appellant') requesting initiation of an anti-dumping investigation on Rebar originated or exported from Singapore and Turkey. The respondent provided its response to the foreign producer's/exporter's questionnaire that had been distributed by the fourth appellant ('the Government'). The Investigation Authority ('IA') ie the Trade Practices Section of the Ministry of International Trade and Industry prepared a preliminary determination report on its finding which was submitted to the second appellant. The Government made an affirmative preliminary determination of dumping and injury resulting in the continuance of the investigation and consequently resulted in the imposition of provisional anti-dumping duties at the rate of 3.35% against Rebar originated from or exported from Singapore and Turkey as a provisional measure pursuant to s 24(2) of the Act. The respondent contended that the calculation methodology was defective and urged the Government to reconsider the preliminary determination findings. The IA prepared the final determination

report that was then submitted to the second appellant, which gave its recommendation to the Minster of Finance ('the first appellant'). The second appellant was of the view that the final determination report showed that the dumping of the subject merchandise originating from or exported from Singapore or Turkey had resulted in material injury to the domestic market. As a result, the second appellant made a recommendation that an affirmative final determination was made against the imported subject merchandise which originated from or exported from Singapore and Turkey. Subsequently, the first appellant imposed the respondent with anti-dumping duties at the rate of 3.62%. Aggrieved, the respondent filed an application for leave to commence judicial review proceedings in the High Court against the appellants. The respondent had alleged, inter alia, that the dumping margin had been erroneously calculated to be at the rate of 3.62% when: (a) in arriving at the export price, the IA had used internal pricing between respondent and intermediary ie DDT and not the price actually paid for the Rebar based on the sales transaction between DDT and Malaysian importers; and (b) the IA had refused to make proper adjustments which affected price comparability when the IA refused to offset the effect of duty drawback in the dumping margin calculation. The learned High Court judge dismissed the respondent's application for judicial review and the respondent appealed against the decision. The Court of Appeal allowed the appeal and reversed the High Court decision and in doing so, the Court of Appeal was in accord with the respondent in holding that: (i) the export price that was to be determined for the purpose of imposing the anti-dumping duties should be following the formula as set out in s 17 of the Act; (ii) it should have been the price under s 17(2) of the Act whereby when the subject merchandise was first resold to an independent buyer and in particular the export price by DDT here to the Malaysian party and as such under s 17(3) of the Act allowance shall be made for all costs incurred between importation and resale; and (iii) the duty drawback should be allowed under s 18 of the Act as there was sufficient basis for the respondent to say that the import duties for raw materials was imposed on them with respect to the product sold in the domestic market. The appellants obtained leave to appeal to the Federal Court upon the following questions of law: (A) whether s 17 of the Act must be read with s 18 of the same to ensure fair comparison between export price and normal value which was normally at ex-factory level ('question 1'); (B) whether s 17(2) and 17(3) of the Act were applicable for the determination of export price when the export price had been determined based on s 17(1) of the same and no issue arose that there was no export price or that it appeared that the export price was unreliable ('question 2'); and (C) whether in making a price comparison pursuant to s 18 of the Act and reg 32 of the Countervailing and Anti-Dumping Duties Regulations 1994 between the export price and normal value, adjustment had to be made even though no cost was borne by the respondent in the domestic market with respect to duty drawback ('question 5').

Held, allowing the appeal with no order as to costs:

(1) Section 17(1) of the Act was plain and unambiguous that the export price shall be the price actually paid or payable for the subject merchandise. Although the respondent and DDT were related trading companies, the use of the sales transaction between them to establish the export price was nevertheless reasonable. Section 17(2) of the Act did not merely envisage the potential or possible situation where the exporter and third party were related, it also envisaged the same to occur between the exporter and importer. Accordingly, it might be untenable to suggest that the use of the sales transaction between the respondent and DDT were not reliable solely based on the fact that both of them were related trading companies. Where s 2(5) of the Act was not applicable to deem the respondent and DDT as related parties, s 17(2) and 17(3) of the same could not therefore be applicable to construct the export price on the basis of the price at which the subject merchandise was first resold to an independent buyer, upon the rationale that it was not satisfied that the export price was unreliable when the respondent and DDT were not deemed related. Accordingly, since the export price based on the sales transaction between the respondent and DDT was reliable, the application of s 17(2) of the Act was also precluded as one of the instances for its application was where there was no export price. Hence, ss 17 and 18 of the Act must be read together to ensure fair comparison between export price and normal value which was normally at ex-factory level, in order to promote the underlying intent and purpose of the Act which was to protect local industries from unfair trade practices by foreign manufacturers that cause harm to the industry. There was no error in the finding made by the learned High Court judge in deciding that the IA had correctly selected the sales transaction between the respondent and DDT to arrive at the export price. Subsequently, as a result of reading ss 17 and 18 of the Act together, the export price and normal value must be compared fairly with each other. In applying s 18(1) of the Act, it was the 'comparison' that must be fair, and the requirement of fairness did not in any way extend to the establishment of export price. Therefore, question 1 was answered in the affirmative whereas question 2 was answered in the negative (see paras 58, 61–62, 75–76, 81 & 89–90).

(2) The exemption of import duties on raw materials which was the drawback were only available on the condition that the Rebar were exported through the Turkish Inward Processing Regime, and therefore the respondent's domestic sales of the subject merchandise did not enjoy similar duty drawback as the import duties for raw materials were imposed on them with respect to the product sold in the domestic market. Section 18(3) of the Act placed an obligation on the respondent to make substantiated requests for due allowance demonstrating that there was a difference affecting prices and price comparability. The

respondent must demonstrate that due allowance should have been made with respect to a difference that was demonstrated to affect price comparability between the normal value and the export price. Since demonstration did not seem to have been made as to how the difference as claimed affects the prices and price comparability, the respondent failed to discharge the burden of substantiating, as constructively as possible, the request for adjustments, by demonstrating that it affected price comparability. The mere existence of the duty drawback for raw materials used to produce the subject merchandise that was solely for export purposes did not automatically mean that price compatibility had been affected. Thus, such factor did not represent a difference affecting the comparability between the normal value and export price, and no allowances were therefore permitted under s 18(3) of the Act. Question 5 was answered in the negative (see paras 100–101 & 112–114).

[Bahasa Malaysia summary

Responden adalah sebuah syarikat yang diperbadankan di Republik Turki yang melibatkan Diler Dis Ticaret Anomin Sierkti ('DDT'), sebuah syarikat perdagangan berkaitan untuk mengeksport bar keluli pengukuhan ('Rebar') ke Malaysia. Persatuan Keluli Malaysia, bagi pihak industri domestik, telah mengemukakan petisyen anti-lambakan sulit dan tidak sulit menurut ss 4 dan 20 Akta Duti Timbal Balas dan Anti-Lambakan 1993 ('Akta') kepada Menteri Perdagangan Antarabangsa dan Industri ('perayu kedua') memohon untuk memulakan siasatan anti-lambakan ke atas Rebar yang berasal atau dieksport dari Singapura dan Turki. Responden telah memberikan responsnya kepada soal selidik pengeluar/pengeksport asing yang telah diedarkan oleh perayu keempat ('Kerajaan'). Pihak Berkuasa Penyiasat ('IA') iaitu Seksyen Amalan Perdagangan Kementerian Perdagangan Antarabangsa dan Industri telah menyediakan laporan penentuan awal mengenai penemuannya yang telah dikemukakan kepada perayu kedua. Kerajaan telah membuat penentuan awal afirmatif mengenai lambakan dan kecederaan yang mengakibatkan penerusan siasatan dan seterusnya mengakibatkan pengenaan duti anti-lambakan sementara pada kadar 3.35% ke atas Rebar yang berasal atau dieksport dari Singapura dan Turki sebagai langkah sementara menurut s 24(2) Akta. Responden berhujah bahawa metodologi pengiraan adalah cacat dan menggesa Kerajaan untuk mempertimbangkan semula penemuan penentuan awal tersebut. IA telah menyediakan laporan penentuan akhir yang kemudiannya dikemukakan kepada perayu kedua, yang memberikan cadangannya kepada Menteri Kewangan ('perayu pertama'). Perayu kedua berpendapat bahawa laporan penentuan akhir menunjukkan bahawa lambakan barang dagangan subjek yang berasal atau dieksport dari Singapura atau Turki telah mengakibatkan kecederaan material kepada pasaran domestik. Akibatnya, perayu kedua membuat cadangan bahawa penentuan akhir afirmatif dibuat terhadap barang dagangan subjek import yang berasal atau dieksport dari Singapura dan Turki. Selanjutnya, perayu pertama mengenakan duti

anti-lambakan ke atas responden pada kadar 3.62%. Terkilan, responden telah memfailkan permohonan untuk mendapatkan kebenaran untuk memulakan prosiding semakan kehakiman di Mahkamah Tinggi terhadap perayu-perayu. Responden telah mendakwa, antara lain, bahawa margin lambakan telah silap dikira pada kadar 3.62% apabila: (a) dalam mencapai harga eksport, IA telah menggunakan harga dalaman antara responden dan perantara iaitu DDT dan bukan harga sebenar yang dibayar untuk Rebar berdasarkan transaksi jualan antara DDT dan pengimport Malaysia; dan (b) IA telah enggan untuk membuat pelarasan yang sewajarmya yang menjejaskan kebolehbandingan harga apabila IA enggan mengimbangi kesan rebat duti dalam pengiraan margin lambakan. Hakim Mahkamah Tinggi yang bijaksana menolak permohonan responden untuk semakan kehakiman dan responden merayu terhadap keputusan tersebut. Mahkamah Rayuan membenarkan rayuan tersebut dan membatalkan keputusan Mahkamah Tinggi dan dengan berbuat demikian, Mahkamah Rayuan bersetuju dengan responden dalam memutuskan bahawa: (i) harga eksport yang akan ditentukan bagi tujuan mengenakan duti anti-lambakan hendaklah mengikut formula yang dinyatakan dalam s 17 Akta; (ii) ia sepatutnya adalah harga di bawah s 17(2) Akta di mana apabila barang dagangan subjek pertama kali dijual semula kepada pembeli bebas dan khususnya harga eksport oleh DDT di sini kepada pihak Malaysia dan oleh itu di bawah s 17(3) Akta, elaun hendaklah dibuat untuk semua kos yang ditanggung antara pengimportan dan penjualan semula; dan (iii) rebat duti hendaklah dibenarkan di bawah s 18 Akta kerana terdapat asas yang mencukupi bagi responden untuk mengatakan bahawa duti import untuk bahan mentah dikenakan ke atas mereka berkenaan dengan produk yang dijual di pasaran domestik. Perayu-perayu telah memperoleh kebenaran untuk merayu kepada Mahkamah Persekutuan atas persoalan undang-undang berikut: (A) sama ada s 17 Akta mesti dibaca bersama dengan s 18 Akta yang sama untuk memastikan perbandingan yang adil antara harga eksport dan nilai normal yang biasanya pada peringkat kilang ('soalan 1'); (B) sama ada s 17(2) dan 17(3) Akta terpakai untuk penentuan harga eksport apabila harga eksport telah ditentukan berdasarkan s 17(1) Akta yang sama dan tiada isu timbul bahawa tiada harga eksport atau bahawa ia kelihatan bahawa harga eksport itu tidak boleh dipertimbangkan ('soalan 2'); dan (C) sama ada dalam membuat perbandingan harga menurut s 18 Akta dan peraturan 32 Peraturan-Peraturan Duti Timbal Balas dan Anti-Lambakan 1994 antara harga eksport dan nilai normal, pelarasan perlu dibuat walaupun tiada kos ditanggung oleh responden dalam pasaran domestik berkenaan dengan rebat duti ('soalan 5').

Diputuskan, membenarkan rayuan tanpa perintah kos:

(1) Seksyen 17(1) Akta adalah jelas bahawa harga eksport hendaklah harga yang sebenarnya dibayar atau perlu dibayar untuk barang dagangan subjek. Walaupun responden dan DDT adalah syarikat perdagangan

berkaitan, penggunaan transaksi jualan antara mereka untuk mewujudkan harga eksport adalah munasabah. Seksyen 17(2) Akta tidak semata-mata membayangkan situasi yang mungkin atau berpotensi di mana pengeksport dan pihak ketiga adalah berkaitan, ia juga membayangkan perkara yang sama berlaku antara pengeksport dan pengimport. Oleh itu, adalah tidak dapat dipertahankan untuk mencadangkan bahawa penggunaan transaksi jualan antara responden dan DDT tidak boleh dipertimbangkan semata-mata berdasarkan fakta bahawa kedua-duanya adalah syarikat perdagangan berkaitan. Di mana s 2(5) Akta tidak terpakai untuk menganggap responden dan DDT sebagai pihak berkaitan, s 17(2) dan 17(3) Akta yang sama oleh itu tidak boleh terpakai untuk membina harga eksport berdasarkan harga di mana barang dagangan subjek pertama kali dijual semula kepada pembeli bebas, atas alasan bahawa ia tidak berpuas hati bahawa harga eksport itu tidak boleh dipertimbangkan apabila responden dan DDT tidak dianggap berkaitan. Sehubungan itu, memandangkan harga eksport berdasarkan transaksi jualan antara responden dan DDT adalah boleh dipertimbangkan, pemakaian s 17(2) Akta juga dikecualikan kerana salah satu daripada keadaan untuk pemakaiannya adalah di mana tiada harga eksport. Oleh itu, ss 17 dan 18 Akta mesti dibaca bersama untuk memastikan perbandingan yang adil antara harga eksport dan nilai normal yang biasanya pada peringkat kilang, untuk menggalakkan maksud dan tujuan Akta untuk melindungi industri tempatan daripada amalan perdagangan tidak adil oleh pengilang asing yang menyebabkan kemudaratan kepada industri tersebut. Tiada kesilapan dalam penemuan yang dibuat oleh hakim Mahkamah Tinggi yang bijaksana dalam memutuskan bahawa IA telah betul memilih transaksi jualan antara responden dan DDT untuk mencapai harga eksport. Seterusnya, sebagai hasil daripada pembacaan ss 17 dan 18 Akta bersama-sama, harga eksport dan nilai normal mesti dibandingkan secara adil antara satu sama lain. Dalam mengguna pakai s 18(1) Akta, 'perbandingan' itulah yang mesti adil, dan keperluan keadilan tidak dalam apa-apa cara meliputi kepada penubuhan harga eksport. Oleh itu, soalan 1 dijawab dengan afirmatif manakala soalan 2 dijawab dengan negatif (lihat perenggan 58, 61–62, 75–76, 81 & 89–90).

(2) Pengecualian duti import ke atas bahan mentah yang merupakan rebat hanya tersedia dengan syarat Rebar dieksport melalui Turkish Inward Processing Regime, dan oleh itu jualan domestik responden bagi barang dagangan subjek tidak menikmati rebat duti yang serupa kerana duti import untuk bahan mentah dikenakan ke atas mereka berkenaan dengan produk yang dijual di pasaran domestik. Seksyen 18(3) Akta meletakkan kewajipan ke atas responden untuk membuat permohonan yang berasas untuk elaun sewajarnya yang menunjukkan bahawa terdapat perbezaan yang menjejaskan harga dan kebolehbandingan

harga. Responden mesti menunjukkan bahawa elaun sewajarnya sepatutnya dibuat berkenaan dengan perbezaan yang ditunjukkan menjejaskan kebolehbandingan harga antara nilai normal dan harga eksport. Oleh kerana demonstrasi nampaknya tidak dibuat tentang bagaimana perbezaan seperti yang didakwa menjejaskan harga dan kebolehbandingan harga, responden gagal untuk melaksanakan beban pembuktian, sebaik mungkin, permintaan untuk pelarasan, dengan menunjukkan bahawa ia menjejaskan kebolehbandingan harga. Kewujudan semata-mata rebat duti untuk bahan mentah yang digunakan untuk menghasilkan barang dagangan subjek yang semata-mata untuk tujuan eksport tidak secara automatik bermakna keserasian harga telah terjejas. Oleh itu, faktor sedemikian tidak mewakili perbezaan yang menjejaskan kebolehbandingan antara nilai normal dan harga eksport, dan tiada elaun oleh itu dibenarkan di bawah s 18(3) Akta. soalan 5 dijawab dengan negatif (lihat perenggan 100–101 & 112–114).]

Cases referred to

Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal [2011] 6 MLJ 297, FC (refd)

BX Steel Posco Cold Rolled Sheet Co Ltd v Minister of Finance & Ors (FIW Steel Sdn Bhd, intervener) [2021] 7 MLJ 604, HC (refd)

Chor Phaik Har v Farlim Properties Sdn Bhd [1994] 3 MLJ 345, FC (refd)

Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor [2018] 2 MLJ 590, FC (refd)

Letitia Bosman v Public Prosecutor and other appeals (No 1) [2020] 5 MLJ 277, FC (refd)

Majlis Perbandaran Seremban v Tenaga Nasional Bhd [2020] 12 MLJ 1, FC (refd)

Pengusaha, Tempat Tahanan Perlindungan Kamunting, Taiping & Ors v Badrul Zaman bin PS Md Zakariah [2018] 12 MLJ 49, FC (refd)

Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi bin Mukhtar [2020] 1 MLJ 141, FC (refd)

Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased) [2020] 4 MLJ 721, FC (refd)

Legislation referred to

Countervailing and Anti-Dumping Duties Act 1993 ss 2, 2(1), (5), (5)(a), (6), 4, 16(1), 17, 17(1), (2), (3), 18, 18(1), (2), (3), 20, 20(8), 23, 24(2), 25(2), (2A), (4), (5), 30(3), (4)

Countervailing and Anti-Dumping Duties Regulations 1994 regs 7, 32

Courts of Judicature Act 1964 ss 96(a), 97

Customs (Anti-Dumping Duties) Order 2020

Customs (Provisional Anti-Dumping Duties) Order 2019

Customs Act 1901 [AU] s 269TAB(1)(a)
Customs Act 1967 s 11(1)
Interpretation Acts 1948 and 1967 s 17A

Appeal from: *Diler Miler Celik Endustru Ve Ticaret AS also known as Diler Iron and Steel Co Inc v Menteri Kewangan & Ors* [2025] 1 MLJ 694 (Court of Appeal, Putrajaya)

Rahazlan Affandi bin Abdul Rahim (with Siti Naquiah bt Mohd Jamel) (Attorney General's Chambers) for the appellants.
Not represented for the respondent.

Zabariah Yusof FCJ:

[1] This appeal relates to the application of ss 17 and 18 of the Countervailing and Anti-Dumping Duties Act 1993 (Act 504), particularly in relation to the determination of the export price of subject merchandise for the purpose of imposition of anti-dumping duties.

[2] We heard the submissions of both parties on 15 April 2025 and delivered our decision on the same day whereby we unanimously allowed the appeal with no order as to costs. We hereby provide our reasons for so deciding.

[3] The appellants obtained leave to appeal to the Federal Court under ss 96(a) and 97 of the Courts of Judicature Act 1964 upon the following questions of law:

(a) question 1:
Whether s 17 of Act 504 must be read with s 18 of the same to ensure fair comparison between export price and normal value which is normally at ex-factory level?

(b) question 2:
Whether sub-ss 17(2) and 17(3) of Act 504 are applicable for the determination of export price when the export price had been determined based on sub-s 17(1) of the same and no issue arises that there is no export price or that it appears that the export price is unreliable?

(c) question 3:
Whether the determination of export price can be made pursuant to sub-ss 17(2) and 17(3) of Act 504 without taking into account sub-ss 17(1), 18(1) and 18(3) of the same?

(d) question 4:
Whether the respondent's sales transaction to DDT can be interpreted as normal value pursuant to sub-s 16(1) of Act 504 when the product that

A is being sold by the respondent to DDT is for the purpose of importation into Malaysia and not for use in exporter's domestic market? and

(e) question 5:
Whether in making a price comparison pursuant to s 18 of Act 504 and reg 32 of the Countervailing and Anti-Dumping Duties Regulations 1994 ('the CADDR') between the export price and normal value, adjustment had to be made even though no cost was borne by the respondent in the domestic market with respect to duty drawback?

C **[4]** In this judgment, the parties will be referred to, as follows:

(a) Menteri Kewangan ('the first appellant');

(b) Menteri Perdagangan Antarabangsa dan Industri ('the second appellant');

D (c) Ketua Pengarah Jabatan Kastam Diraja Malaysia ('the third appellant');

(d) Kerajaan Malaysia ('the fourth appellant'); and

(e) Diler Demir Celik Endustru Ve Ticaret AS ('the respondent').

E BACKGROUND FACTS

[5] Diler Demir Celik Endustru Ve Ticaret AS ('the respondent') also known as Diler Iron and Steel Co Inc ('DDC') is a company incorporated in the Republic of Turkey. The respondent engaged Diler Dis Ticaret Anomin Sierkti ('DDT'), a related trading company to export Steel Reinforcing Bar ('Rebar') into Malaysia.

[6] On 29 March 2019, the Malaysian Steel Association ('MSA'), which is the fifth respondent in the High Court, on behalf of the domestic industry, namely:

(a) Malaysia Steel Works (KL) Bhd;

(b) Amstee Mills Sdn Bhd;

H (c) Antara Steel Mills Sdn Bhd; and

(d) Established Metal Industries Sdn Bhd,

submitted both a confidential and non confidential anti-dumping petition pursuant to ss 4 and 20 of Act 504 to the second appellant requesting initiation of an anti-dumping investigation on Rebar originated or exported from Singapore and Turkey.

[7] On 26 April 2019, the second appellant, issued the Notice of Initiation of an Anti-Dumping Duty Investigation, initiating anti-dumping

investigation on imports of Rebar originated or exported from Singapore and Turkey. This was published in the Government Gazette PU(B) 211/2019. Such an action was empowered under:

(a) s 20(8) of Act 504;

(b) reg 7 of the CADDR; and

(c) agreement on implementation of article VI of the General Agreement on Tariffs and Trade 1994 set out in Annex 1A of the World Trade Organisation ('WTO') Agreement ('WTO AD Agreement').

[8] The respondent provided its response to the foreign producer's/exporter's questionnaire that had been distributed by the Government on 7 June 2019.

[9] On 5 September 2019, the Investigation Authority ('IA') ie the Trade Practices Section of the Ministry of International Trade and Industry prepared a *Preliminary Determination Report* on its finding which was submitted to the second appellant pursuant to s 30(3) of Act 504.

[10] The Government made an *Affirmative Preliminary Determination of dumping and injury* resulting in the continuance of the investigation and published a *Notice of Affirmative Preliminary Determination of an Anti-Dumping Duty Investigation via Gazette* (PU(B) 454/2019) dated 19 September 2019 pursuant to s 23 of Act 504.

[11] Consequently, on 20 September 2019, the Affirmative Preliminary Determination resulted in the imposition of *provisional anti-dumping duties at the rate of 3.35%* against Rebar originated from or exported from Singapore and Turkey by way of Customs (Provisional Anti-Dumping Duties) Order 2019 (PU(A) 265/2019) dated 20 September 2019 as a provisional measure pursuant to s 24(2) of Act 504.

[12] The respondent submitted its *Comments* on the Preliminary Determination Report with respect to the findings of the IA and contended that the calculation methodology was defective and urged the fourth appellant to reconsider the Preliminary Determination Findings on 4 October 2019.

[13] From 14 October 2019–17 October 2019, the IA carried out a *verification visit* in the respondent's premises in Turkey to verify the information provided by the respondent in the producer/foreign exporter's questionnaire.

[14] On 23 December 2019, the IA submitted its final finding in the form of

Notice of Essential Facts to inform the respondent the essential facts under consideration that form the basis for the decision whether to apply definitive measures and gave all interested parties including the respondent time to defend its interest pursuant to s 25(2) and (2A) of Act 504.

[15] On 27 December 2019, the respondent submitted its *Comments* on the Notice of Essential Facts.

[16] On 7 January 2020, the IA prepared the *Final Determination Report — Anti-Dumping Investigation*. This report was then submitted to the second appellant pursuant to s 30(3) of Act 504, which gave its recommendation to the first appellant pursuant to s 30(4) of Act 504.

[17] The second appellant was of the view that the Final Determination Report showed that the dumping of the subject merchandise originating from or exported from Singapore or Turkey had resulted in material injury to the domestic market. As a result, the second appellant made a recommendation that an Affirmative Final Determination is made pursuant to sub-s 25(4) of Act 504 against the imported subject merchandise which originated from or exported from Singapore and Turkey. Subsequently, the respondent was imposed with anti-dumping duties at the rate of 3.62%.

[18] After considering all the relevant information which includes the second appellant's recommendation, pursuant to s 25(4) of Act 504, on 15 January 2020, the first appellant made an *Affirmative Final Determination* by way *Notice of Affirmative Final Determination* dated 15 January 2020. This was *gazetted* on 21 January 2020 via PU(B) 46/2020.

[19] On 16 January 2020, the first appellant imposed *anti-dumping duties at the rate of 3.62%* on Rebar originated or exported from Singapore and Turkey via Customs (Anti-Dumping Duties) Order 2020 dated 16 January 2020, which was *gazetted* via PU(A) 22/2020 on 21 January 2020. This is pursuant to s 25(5) of Act 504 read together with s 11(1) of the Customs Act 1967 (Act 235).

[20] The respondent was aggrieved with this decision of the first appellant on the imposition of anti-dumping duties at the rate of 3.62% on Rebar originated or exported from the respondent's country from 22 January 2020 to 21 January 2025 as set out in the Customs (Anti-Dumping Duties) Order 2020 (PU(A) 22) dated 21 January 2020.

[21] As a result, the respondent filed an application for leave to commence judicial review proceedings in the High Court of Kuala Lumpur on 19 February 2020 against the appellants.

PROCEEDINGS AT THE HIGH COURT

[22] The respondent had, alleged, inter alia, that the dumping margin had been erroneously calculated to be at the rate of 3.62% when:

(a) in arriving at the export price, the IA had used internal pricing between respondent and intermediary ('DDT') and not the price actually paid for the Rebar based on the sales transaction between DDT and Malaysian importers; and

(b) the IA had refused to make proper adjustments which affects price comparability when the IA refused to offset the effect of duty drawback in the Dumping Margin calculation.

[23] Hence, the respondent prayed for a certiorari order to quash:

(a) the first appellant's decision to impose anti-dumping duties at the rate of 3.62% on Rebar originated or exported from the respondent in the Republic of Turkey from 22 January 2020 to 21 January 2025 as set out in the Customs (Anti-Dumping Duties) Order 2020 (PU(A) 22 dated 21 January 2020); and

(b) the second appellant's decision and/or recommendation to impose anti-dumping duties at the rate of 3.62% on Rebar originated or exported from the respondent in the Republic of Turkey as set out in the Notice of Affirmative Final Determination (PU(B) 46 dated 21 January 2020) and the Final Determination Report of an Anti-Dumping Duty Investigation dated 7 January 2020 respectively (collectively referred to as the 'impugned decisions').

[24] It is pertinent to note that the IA had used the internal sale price between the respondent and its related company, DDT (which is its wholly-owned subsidiary), as the 'export price' of the merchandise. In the High Court, the respondent mounted a challenge on the determination of the 'export price' on the basis that the respondent and DDT are related companies, and thus the selling price is unreliable under s 17(2) of Act 504 read together with s 2(5) of the same.

[25] On 23 September 2021, the learned High Court judge dismissed the respondent's application for judicial review and found that the decision of the appellants was not irrational or illegal as all the processes taken in the decision making was in accordance with law, which did not warrant interference of the court.

[26] The learned High Court judge was of the view that the IA had acted pursuant to s 17(1) of Act 504 which provides that the export price shall be the

price actually paid or payable for the subject merchandise, and therefore the reliance of the IA on those sales transactions was not unreliable based on the invoices as proof of sales transaction between the respondent and DDT obtained from the respondent. Furthermore, Her Ladyship held that even though the respondent and DDT are related trading companies, the IA in determining the export price had acted in accordance with s 17(1) of Act 504, and there is no requirement for the export price to be construed in accordance to s 17(2) read together with s 17(3) of the same as the issue of unreliability of export price does not arise.

PROCEEDINGS AT THE COURT OF APPEAL

[27] The respondent appealed to the Court of Appeal against the decision of the High Court. On 27 February 2023, the Court of Appeal allowed the appeal and reversed the High Court decision and in doing so, the Court of Appeal was in accord with the respondent when the panel of the Court of Appeal held that:

(a) the export price that is to be determined for the purpose of imposing the anti-dumping duties should be following the formula as set out in s 17 of Act 504;

(b) it should have been the price under s 17(2) of Act 504 whereby when the subject merchandise is first resold to an independent buyer and in particular the export price by DDT here to the Malaysian party and as such under s 17(3) of Act 504 allowance shall be made for all costs incurred between importation and resale;

(c) from the evidence adduced, this formula has not been followed and instead the appellants have tried to calculate based on the normal value (sale between DDC to DDT) and then adding in the relevant cost factor. Such a method is not provided for, under Act 504 and does not take into account the profit element from a resale by DDT to Malaysian entities; and

(d) the duty drawback should be allowed under s 18 of Act 504 as there is sufficient basis for the respondent to say that the import duties for raw materials was imposed on them with respect to the product sold in the domestic market.

[28] As a result, the Court of Appeal granted, inter alia, the following reliefs:

(a) an order of certiorari to quash the impugned decisions;

(b) directing the relevant authorities under Act 504 to re-assess and re-calculate the applicable anti-dumping duty based on the following direction:

(i) the export price of the respondent is to be determined based on the

price of the subject merchandise when it was first resold to an independent buyer, specifically, the export price by DDT to the Malaysian importers with allowance to be made for all costs incurred between importation and resale as per s 17(1), 17(2) and 17(3) of Act 504 and article 2.3 of the WTO AD Agreement; and

(ii) duty drawback adjustments sought by the respondent be allowed by adding the said duty drawback adjustment sum claimed to the export price of the respondent as per s 18 of Act 504, article 2.4 of WTO AD Agreement and other relevant article of the same.

THE LAW ON DUMPING AND ANTI-DUMPING

[29] 'Dumping' occurs when a country or a company exports a product at a lower price than its domestic sale price. This may be made possible due to low costs of production because of subsidies that the foreign company receives in the domestic market. To offset such subsidies 'countervailing duties' are imposed. Dumping is considered as an unfair pricing strategy in the international trade. Dumping, if unregulated, has a negative impact on the financial viability of the product's manufacturer or producer in the importing country. To discourage the foreign companies from selling products into the country at low prices, the importing country like Malaysia, will impose an 'anti dumping duty' on the products upon its importation to protect the domestic businesses from unfair pricing strategy.

[30] Historically, Malaysia has been a member of the World Trade Organisation ('WTO') since 1 January 1995 and also a member of the General Agreement on Tariffs and Trade 1994 ('GATT') since 24 October 1957. Article V1 of GATT makes provision for the right of contracting parties to apply anti-dumping measures against imports of a product at an export price below its normal value (usually the price of the product in the domestic market of the exporting country) if such dumped imports cause injury to domestic market in the territory of the importing contracting party.

[31] Malaysia, as a signatory member of GATT, further entered into an 'Agreement on implementation of article V1 of GATT' ('the implementation agreement'). This is to regulate and govern the implementation of anti dumping measures in Malaysia. The implementation agreement consists of important provisions, conditions and scopes on the imposition of anti-dumping measures that signatory members have agreed to observe as a matter of principle. The implementation agreement allows Malaysia to act against 'dumping' (exporting at an unfairly low price) if it causes material injury to the domestic industry. It sets out detailed procedures for conducting anti-dumping investigations.

[32] Hence, as a member of GATT, and a contracting party to the implementation agreement, Malaysia agreed that an anti-dumping measure shall be applied only under the circumstances provided for in article V1 of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of the implementation agreement.

[33] It is pertinent to bear in mind the trite principle, that international treaties do not form part of our law, unless the provisions therein have been incorporated into our domestic law (see *Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal* [2011] 6 MLJ 297 (FC) and *Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277 (FC)).

[34] Hence, to comply with its WTO's obligations, specifically the Anti-Dumping Agreement ('ADA') and article VI of the GATT, Malaysia implements anti-dumping laws through Act 504 and the CADDR 1994. These laws incorporate and implement the important provisions of the implementation of the agreement into locally enforceable anti-dumping laws. Act 504 is 'An Act to make provisions for the investigation and determination of subsidies being provided on, and the dumping of, merchandise imported into Malaysia, the imposition of countervailing and anti-dumping duties to offset such subsidies or dumping, and any other matters connected therewith' (see the preamble of Act 504).

[35] These laws allow Malaysia to impose anti-dumping duties on imported goods that are sold at a 'normal value' price in the exporting country, provided these imports cause or threaten to cause injury to a domestic industry.

[36] The second appellant has been entrusted as the regulatory body to enforce Act 504 with the legal objective to empower the IA to take such remedial measures against unfair trading by foreign manufacturers/exporters and to provide a framework for investigating allegations of injury caused by dumped or subsidised imports.

[37] Under Act 504, s 2(1) provides for the definitions of 'dumping' and 'dumping margin' as follows:

> 'dumping' means *the importation of merchandise into Malaysia at less than its normal value* as sold in the domestic market of the exporting country;
>
> 'dumping margin' means the amount by which *the normal value of a merchandise exceeds the export price*; (Emphasis added.)

[38] The term 'export price' is defined under s 2(1) of Act 504 in accordance with s 17 of the same, which is as follows:

> 'export price' means the export price of a merchandise as determined in accordance

with s 17;

[39] For purposes of the present appeal, ss 17 and 18 of Act 504 play an important role, which are reproduced below:

17 Export price

(1) *The export price shall be the price actually paid or payable for the subject merchandise.*

(2) *In cases where there is no export price or where it appears that the export price is unreliable* because the exporter and the importer or a third party are related, or that there is a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the subject merchandise is first resold to an independent buyer, or if the subject merchandise is not resold to an independent buyer, or not resold in the condition imported, on any reasonable basis.

(3) If the export price is constructed as described in subsection (2), allowance shall be made for all costs incurred between importation and resale.

18 Comparison of normal value and export price

(1) A fair comparison shall be made between the export price and the normal value.

(2) The comparison shall be made at the same level of trade, normally at ex-factory level, and in respect of sales made at as nearly as possible the same time and due account shall be taken of other differences that affect price comparability.

(3) Where the normal value and the export price as established are not on a comparable basis, due allowance, in the form of adjustments, shall be made in each case, on its merits, for differences in factors that are claimed, and demonstrated, to affect prices and price comparability.

(4) If the determination of the export price under subsection 17(2) affects price comparability, the Government shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as provided under this section.

(5) In a case where the subject merchandise is not imported directly from the country of origin but is exported from an intermediate country, the price at which the subject merchandise is sold from the exporting country to Malaysia shall be compared with the comparable price in the exporting country.

(6) Notwithstanding subsection (5), comparison may be made with the price in the country of origin if —

(a) the subject merchandise is merely transhipped through the exporting country;

(b) the subject merchandise is not produced in the exporting country; or

(c) there is no comparable price for the subject merchandise in the exporting country.

(7) Where an exporter or importer claims for an adjustment under subsection (3), it shall prove that its claim is justified.

(8) The Government shall indicate to the parties in question the information that is necessary to ensure a fair comparison.

[40] Similarly, in *Hansard* dated 24 May 1993, the then Deputy Minister of International Trade and Industry in tabling the Countervailing and Anti-Dumping Duties Bill stated that it was important to ensure that it conformed with the principles under the GATT Code on Countervailing Duty and Anti-Dumping:

> *Rang Undang-undang yang dibentangkan ini adalah selaras dan berpegang kepada prinsip dan peraturan antarabangsa yang ditetapkan, iaitu 'GATT Code on Countervailing Duty and Anti-Dumping'*. Dengan itu, negara-negara lain tidak perlu khuatir bahawa ianya akan digunakan untuk tujuan perlindungan. Ini ada berkaitan juga dengan soalan yang baru ditimbulkan oleh Yang Berhormat dari Kepong, dan ianya menjadi rujukan kami bila kita merumuskan Rang Undang-undang ini. Selain daripada 'GATT Code' kita telah mengkaji Akta-akta yang sama, yang ada di Amerika Syarikat, di EC, di Australia dan negara-negara lain. Apa yang dibawa oleh Ahli Yang Berhormat dari Kepong, usaha kepada rujukan kita, oleh kerana kalau Kod atau Rang Undang-undang ini bercanggah dengan disiplin antarabangsa atau syarat-syarat antarabangsa yang dikenakan oleh GATT, ini akan menimbulkan masalah kepada negara kita bila aduan dibuat oleh negara-negara lain kepada GATT Council. GATT Council boleh buat keputusan, iaitu Rang Undang-undang ini tidak transparent daripada segi Kod GATT berkaitan dengan timbal balas dan anti-lambakan ... Oleh kerana itu, *adalah mustahak bagi negara kita bila menggubalkan Rang Undang-undang ini bagi menjamin Kod kita yang digunakan, syarat-syarat yang diadakan di dalam Rang Undang-undang ini selaras dengan Kod antarabangsa, khasnya dengan Kod GATT.* (Emphasis added.)

[41] Section 17 of Act 504 provides two bases for quantifying the export price under sub-ss 17(1) and 17(2). Subsection 17(1) defines 'export price' as the price actually paid or payable for the subject merchandise. Subject merchandise means 'the class or kind of merchandise imported or sold for importation into Malaysia that is the subject of any countervailing or anti-dumping duty action under this Act, as determined by the Government to be appropriate for establishing the scope of the action' as defined under s 2 of Act 504.

[42] In essence, sub-s 17(2) applies in two situations. Firstly, when there is no export price. Secondly, when it appears that the export price is unreliable on the

reason that the exporter and the importer or a third party are related or when there is a compensatory agreement between the exporter and the importer or a third party; the export price may be constructed on the basis of the price at which the subject merchandise is first resold to an independent buyer. If the export price is constructed under sub-s 17(2), due allowance shall be made for all costs incurred between importation and resale if the export price is calculated pursuant to sub-s 17(3).

[43] In *BX Steel Posco Cold Rolled Sheet Co Ltd v Minister of Finance & Ors (FIW Steel Sdn Bhd, intervener)* [2021] 7 MLJ 604 (HC), the applicant is a Chinese company whose business activities include the production and sale of cold rolled coils, full hard plates, hot dip galvanised plates, coated plates, coated thin plates and related by products. The third and fourth respondents received a petition for the application for anti-dumping duties on imports of galvanised iron originating from China and Vietnam from FIW Steel Sdn Bhd. The investigation authority recommended to the third respondent to propose to the first respondent to impose a final anti-dumping duty of 5.47%, which was then imposed accordingly. The High Court in *BX Steel* concluded that the calculation of the final anti-dumping duty of 5.47% fell into error when the third respondent admitted that the investigation authority had wrongly deducted ocean freight value from the total free on board export price of the subject merchandise during the calculation and it was also conceded that if such error was rectified a lower margin of 3.12% would be applicable. Furthermore, there was also contravention of s 17 of Act 504 as the respondents acted in excess of their jurisdiction in failing to use the price actually paid by the Malaysian importers to arrive at the export price.

[44] The High Court in *BX Steel* held that sub-s 17(1) of Act 504 is plain and unambiguous that the export price is the price actually paid for the subject merchandise which is the price paid by the importer:

> [23] The provision of s 17(1) is plain and unambigious (sic) that *the export price is the price actually paid for the subject merchandise which is the price paid by the importer.* In the present case the Malaysian importer.
>
> [24] Further, article 2.1 of the WTO-ADA states as follows:
>
> > 2.1 For the purpose of this Agreement, a product is to be considered as being dumped, ie introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.
>
> [25] Those words 'export price' under this article has been explained in a book by Edwin Vermulst titled Oxford Commentaries on GATT/WTO Agreements — The WTO Anti-Dumping Agreement — A Commentary at pp 14 and 15 as follows:
>
> > *Article 2.1 merely provides indirectly that the export price is the product exported*

> *from one country (the exporting country) to another (the importing country).* If, for example, producer x in country X sells T-shirts to importer y in country Y, then the price charged by producer x to importer y is the export price. It may happen that foreign producer sell the product under consideration to other parties, typically traders, in the exporting country which will then resell it to the importing country. On the basis of Article 2.1, it seems clear that the export price then is the price charged by the trader to the importer ...
>
> [26] This commentary further supports that *export price is price actually paid by the importer.*
>
> [27] In furtherance to this, it is also undisputed fact that there is a compensatory agreement between the applicant and Benxi Hong Kong, the trader. The applicant exported its product to Malaysia through Benxi Hong Kong and commission has been paid by the applicant. All this information was submitted to the IA in the applicant questionnaire response and verified by IA.
>
> [28] In this regard, by virtue of s 17(2) of the CADD 1993, *the export price must be based on the price actually paid by the Malaysian importers.* (Emphasis added.)

[45] The principle which could be discerned from *BX Steel* is that the export price must be based on the price actually paid by the Malaysian importers, based on article 2.1 of the WTO AD Agreement which indirectly provides that the export price is the product exported from one country to another country.

[46] The Court of Appeal in the instant case had also referred to *BX Steel* and held that the IA had committed an error of law by using the internal pricing between the respondent and DDT as the export price in contravention of sub-s 17(2) of Act 504. Instead, the Court of Appeal was of the view that the price at which it was resold to the first independent buyer in the importing country should be adopted as the base from which one starts working backwards to reach a constructed export price, in order to strike a fair comparison made between the export price and the normal value as required under sub-s 18(1) of Act 504. The relevant passages in the judgments of the Court of Appeal are reproduced below:

> [62] As the Malaysian importer is an independent buyer, there is no suggestion of price fixing or price fiddling. Whether the exporter sells at a profit or at a loss for reasons such as to injure or kill the domestic market of Malaysia or to gain market share in Malaysia, the 'selling price' to the independent buyer is the base from which one starts working backwards to come to a constructed 'export price'.
>
> [63] *Only then can there be 'a fair comparison made between the 'export price' and the 'normal value' as required under s 18(1) of the Act.* The learned High Court judge appeared to have misconstrued this need to work backwards from an arm's length selling price when the first resale was made to an independent buyer in Malaysia when she expressed her concerns if she did not take the price at which DDC sold to DDT as the 'export price'
>
> ...

[69] *Clearly by using the price at which the subject merchandise was sold by DDC its producer to its related company DDT as the 'export price' instead of the price at which it was resold to the first independent buyer in the importing country, the IA had begun on the wrong footing and committed an error of law.* Having started wrongly, the correct constructed 'export price' cannot be arrived at for the simple reason that one cannot start off wrongly and yet arrive correctly.

[70] *The use of 'internal pricing' between DDC the producer and its related company DDT is illegal as in not in accordance with statutorily prescribed provision in s 17(2) of the Act* and the provisions in article 2.3 and 2.4 of the WTO AD Agreement to which Malaysia is a party and thus rendering the decision made in excess of jurisdiction and ultra vires the Act.

[71] Both our High Court's decision in BX POSCO and the WTO Appellate Body case of EU-Biodiesel together with WTO leading commentaries do not support the use of internal pricing between related parties in the exporting country to construct backwards the 'export price'. (Emphasis added.)

THE PROCEEDINGS AT THE FEDERAL COURT

[47] The respondent was not represented and neither did the respondent appear at the hearing of the appeal before us. We were informed by the learned senior federal counsel that the respondent also stated that it would not appoint any solicitor for the hearing in the Federal Court during the stage of case management via email. The respondent was also given the opportunity to do the hearing via zoom, if needs be, but that was not taken up by the respondent. Given the fact that the respondent was informed of the hearing date on 15 April 2025, the Federal Court decided to proceed with the hearing in the absence of the respondent.

[48] For purposes of the present appeal, the learned senior federal counsel submitted that questions 1, 2 and 5 would ultimately determine the appeal. We will thus only be dealing with the aforesaid questions.

OUR ANALYSIS AND FINDINGS

Questions 1 and 2

[49] We will deal with questions 1 and 2 together.

[50] As indicated by question 1, this raises the fundamental issue as to whether ss 17 and 18 of Act 504 must be read together to ensure fair comparison between export price and normal value which is normally at ex-factory level.

[51] In the interpretation of statutes, the cardinal rule is that, the provisions must be read and construed as a whole (see *Kesatuan Pekerja-Pekerja Bukan*

Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor [2018] 2 MLJ 590 (FC); *Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased)* [2020] 4 MLJ 721 (FC)).

[52] In *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi bin Mukhtar* [2020] 1 MLJ 141 (FC), Zawawi Salleh FCJ delivering the judgment of the Federal Court applied the doctrine of harmonious construction to hold that a statute should be read as a whole whereby one provision therein should be construed with reference to other provisions in the same statute, so as to achieve a harmonious result and avoid any inconsistency or repugnancy either within a section or between a section and other parts of the statute:

> [78] In this regard, it would be convenient for us to discuss the doctrine of harmonious constructions. To put it simply, *the doctrine of harmonious construction means a statute should be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act so as to make a consistent enactment of the whole statute. Such an interpretation is beneficial in avoiding any inconsistency or repugnancy either within a section or between a section and other parts of the statute.* The five main principles of this doctrine/rule are as follows:
>
> (a) the court must avoid a head on clash of seemingly contradictory provisions and they must construe the contradictory provisions so to harmonise them (see *Commissioner of Income Tax v Hindustan Bulk Carriers* [2002] 3 SCC 57 at p 74);
>
> (b) the provision of one section cannot be used to defeat the provision contained in another unless the court, despite all its efforts, is unable to find a way to reconcile their differences;
>
> (c) when it is impossible to completely reconcile the differences in contradictory provisions, the courts must interpret them in such a way that effect is given to both provisions as much as possible (see *Sultana Begum v Prem Chand Jain AIR* [1997] SC 1006 at pp 1009–1010);
>
> (d) courts must also keep in mind that interpretation that reduces one provision to useless or dead lumber is not harmonious construction (see *Commissioner of Income Tax v Hindustan Bulk Carriers* [2002] 3 SCC 57 at p 74); and
>
> (e) to harmonise is not to destroy any statutory provision or to render it fruitless.
>
> [79] In a nutshell, *the doctrine requires that the legislation be construed in a way which would achieve a harmonious result, and that construction should favour coherence in the law.* (Emphasis added.)

[53] The above case was cited with approval by Zaleha Yusof FCJ in *Majlis*

Perbandaran Seremban v Tenaga Nasional Bhd [2020] 12 MLJ 1 (FC), where Her Ladyship opined that the court ought not consider a section in isolation, instead each provision or part of a provision must be read in its immediate context and in the context of the statute as a whole (see paras 30–32 of the judgment).

[54] In the landmark decision of *Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased)* [2020] 4 MLJ 721 (FC), Vernon Ong FCJ held that:

> ... in construing a statute, effect must be given to the object and intent of the Legislature in enacting the statute ... where the words of a statute are unambiguous, plain and clear, they must be given their natural and ordinary meaning. The statute should be construed as a whole and the words used in a section must be given their plain grammatical meaning. It is not the province of the court to add or subtract any word; the duty of the court is limited to interpreting the words used by the legislature and it has no power to fill in the gaps disclosed. Even if the words in a statute may be ambiguous, the power and duty of the court 'to travel outside them on a voyage of discovery are strictly limited' ... the relevant provisions of an enactment must be read in accordance with the legislative purpose and applies especially where the literal meaning is clear and reflects the purposes of the enactment.

[55] Upon a careful reading of the authorities cited above, it is observed that pursuant to s 17A of the Interpretation Acts 1948 and 1967 the court must adopt the construction which promotes and does not stifle the object or intent of the legislation concerned.

[56] In *Pengusaha, Tempat Tahanan Perlindungan Kamunting, Taiping & Ors v Badrul Zaman bin PS Md Zakariah* [2018] 12 MLJ 49 (FC), Ramly Ali FCJ held that reference to *Hansard* is permissible to ascertain and promote the intention, object and purpose underlying the statutory provisions by virtue of s 17A of the Interpretation Acts 1948 and 1967 (see para 45 of the judgment).

[57] The object and purpose underlying Act 504, which is to protect local industries from unfair trade practices by foreign manufacturers that cause harm to the industry, could be gleaned from the *Hansard* date 20 May 1993 when the then Deputy Minister of International Trade and Industry tabled the Countervailing and Anti-Dumping Duties Bill as follows:

> *Tujuan Kerajaan menyediakan Rang Undang-undang ini adalah untuk melindungi industri-industri tempatan dari amalan perdagangan yang tidak adil oleh pengeluar-pengeluar asing yang menyebabkan kemudaratan kepada industri tersebut.* Pada masa ini *sesetengah pengeluar tempatan sedang menghadapi persaingan yang tidak adil daripada pengeluar-pengeluar asing yang menerima subsidi bagi pengeluaran*

A *barangan atau subsidi eksport* serta daripada pengeluar-pengeluar asing yang melambakkan pengeluaran mereka dengan menjual pada harga yang rendah dari harga pasaran atau kos pengeluaran. Tindakan pengeluar-pengeluar asing itu adalah didorong oleh keadaan duti import yang rendah di Malaysia berikutan dengan tindakan Kerajaan untuk menurunkan kadar duti bagi barang tertentu semenjak
B beberapa tahun yang lalu.

Sejajar dengan komitmen Kerajaan dalam Perjanjian Am mengenai Tarif dan Perdagangan (GATT), Malaysia sedang berusaha untuk mengurangkan sekatan-sekatan perdagangan, sama ada berbentuk tarif ataupun bukan tarif. (Emphasis added.)

C

[58] Coming back to the issue in the present appeal, namely, whether the IA had committed an error of law by using the sales transaction between the respondent and DDT to arrive at the export price, sub-s 17(1) of Act 504 is
D plain and unambiguous that the export price shall be the price actually paid or payable for the subject merchandise.

[59] The appellants in their written submission argued that the WTO AD Agreement, Act 504 and the subsidiary regulation *do not* explicitly provide that
E the export price shall be the price paid by the importer in the importing country, and that sub-s 17(1) of Act 504 merely provides that it shall be the price actually paid or payable for the subject merchandise. We find that this is in contrast with s 269TAB(1)(a) of the Australian Customs Act 1901 which explicitly stipulates the export price to be paid by the importer as follows:

F

269TAB Export price

(1) For the purposes of this Part, the export price of any goods exported to Australia is:

(a) where:

G

(i) the goods have been exported to Australia otherwise than by the importer and have been purchased by the importer from the exporter (whether before or after exportation); and

(ii) the purchase of the goods by the importer was an arms length
H transaction;

the price paid or payable for the goods by the importer, other than any part of that price that represents a charge in respect of the transport of the goods after exportation or in respect of any other matter arising after exportation ... (Emphasis added.)

I

[60] In this regard the learned High Court judge took guidance from the Dumping and Subsidy Manual November 2018, Anti-Dumping Commission of the Australian Government provides some guidance in situation involving intermediary, which states as follows:

> Typically the manufacturer, as a principal, and who knowingly sent the goods for export to any destination, will be the exporter. The export price will be the price received by that producer/exporter ie the manufacturer. *Where an intermediary is involved the export price, for the purposes of calculating a dumping or subsidy margin, will be the price received by that exporter when selling to the intermediary* (even if the intermediary is in the same country as the exporter) ... (Emphasis added.)

[61] In the present appeal, although the respondent and DDT are related trading companies, the use of the sales transaction between them to establish the export price is nevertheless reasonable. The grounds and rationale are explained in the following paragraphs.

[62] Subsection 17(2) of Act 504 provides that where it appears that the export price is unreliable because the exporter and the importer or a third party are related, the export price may be constructed on the basis of the price at which the subject merchandise is first resold to an independent buyer. Clearly, such provision does not merely envisage the potential or possible situation where the exporter and third party are related, it also envisages the same to occur between the exporter and importer. Accordingly, it might be untenable to suggest that the use of the sales transaction between the respondent and DDT are not reliable solely based on the fact that both of them are related trading companies.

[63] Subsection 17(2) of Act 504 is similar to article 2.3 of the WTO AD Agreement, which reads as follows:

> 2.3 In cases where there is no export price or *where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party*, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

[64] For purpose of comparison, sub-s 17(2) of Act 504 is reproduced below:

> (2) In cases where there is no export price or *where it appears that the export price is unreliable because the exporter and the importer or a third party are related*, or that there is a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the subject merchandise is first resold to an independent buyer, or if the subject merchandise is not resold to an independent buyer, or not resold in the condition imported, on any reasonable basis.

[65] While article 2.3 of the WTO AD Agreement requires appearance of *unreliability due to association* between the exporter and the importer or a third

party, sub-s 17(2) of Act 504 on the other hand *requires appearance of unreliability* on the basis that the exporter and the importer or a third party are related.

[66] In the WTO Report of the Panel of United States — Anti-Dumping Measures on Certain Oil Country Tubular Goods from Korea, WT/DS488/R, it dealt with the scope and application of article 2.3 of the WTO AD Agreement as follows:

> 7.146. Article 2.3 permits an investigating authority to disregard the transaction export price and construct the export price where, inter alia, 'it appears to the authorities concerned that the export price is unreliable because of association' between the exporter and the importer or a third party. *In our view, it is clear that an investigating authority must have grounds for the view that there is association. If there is no association, the export price cannot appear to be unreliable to the investigating authority 'because of' association.*
>
> 7.147. While it is clear that the appearance of unreliability must be because of association, the text of Article 2.3 does not require any 'determination', let alone a determination as to the reliability of the export price. If such a determination had been intended, in our view Article 2.3 would have been drafted differently, to require, for example, that the investigating authority determine or demonstrate that the export price is unreliable because of association. Instead, it provides that *export price may be constructed where it 'appears to the authorities' that the export price is unreliable. The verb 'appear' has different definitions but we find the definition 'seem to the mind, be perceived as, be considered' to be the most appropriate in respect of the text of Article 2.3.* The adjective 'unreliable' is defined as 'not reliable'. 'Reliable' in turn is defined as 'in which reliance or confidence may be put, trustworthy'. *Thus to us, the use of the terms 'appear to the authorities' and 'unreliable' in Article 2.3 denotes a situation in which, because of the association at issue, the investigating authority perceives the export price not to be trustworthy. Of course, an investigating authority must have grounds for this view: it is always obliged to establish facts properly and evaluate them in an unbiased and objective manner.* Nothing in our understanding of Article 2.3 would suggest, however, any separate requirement to make a 'determination' as to the reliability of the export price.
>
> 7.148. It is also clear, in our view, that *Article 2.3 does not allow an investigating authority to construct export price whenever there is association.* If that were the case, we would again have expected Article 2.3 to have been drafted differently, to require, for instance, that an investigating authority may construct the export price where there is association. *An investigating authority could not simply ignore evidence before it suggesting that the export price is reliable notwithstanding association and go on to construct the export price without considering such evidence.* As noted above, an investigating authority has an obligation to establish facts properly and evaluate them in an unbiased and objective manner, which entails the consideration of relevant evidence on the issues before it. (Emphasis added.)

[67] Upon considering the report as aforesaid and taking heed of the reasoning therein, several principles of law could be distilled in relation to

sub-s 17(2) of Act 504 by analogy as follows:

(a) the use of the terms 'appears' and 'unreliable' in sub-s 17(2) of Act 504 denotes a situation in which the IA perceives the export price not to be trustworthy on the basis that that the exporter and the importer or a third party are related;

(b) an IA must have grounds for the view that the exporter and the importer or a third party are related. Otherwise, the export price cannot appear to be unreliable to the IA on that basis; and

(c) it is always obliged to establish facts properly and evaluate them in an unbiased and objective manner. The IA cannot simply ignore evidence and go on to construct the export price without considering such evidence which suggests that the export price is reliable notwithstanding the relation between the exporter and the importer or a third party.

[68] In the context of Act 504, pursuant to sub-ss 2(5) and 2(6), it provides the requirements for parties to be related, as follows:

> (5) Parties shall be deemed to be related if —
>
> (a) *one of them directly or indirectly controls the other*;
>
> (b) both of them are directly or indirectly controlled by a third party or;
>
> (c) together they directly or indirectly control a third party,
>
> *provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the party concerned to behave differently from non-related parties.*
>
> (6) One party shall be deemed to control another when the first-mentioned party is legally or operationally in a position to exercise restraint or direction over the latter. (Emphasis added.)

[69] Reading through the said subsections suggest that the respondent and DDT shall be deemed to be related by virtue of s 2(5)(a) of Act 504 as held by the Court of Appeal that the respondent being the parent company would virtually and directly control DDT, which is its wholly-owned subsidiary company. In this respect, the Court of Appeal below held that the requirements of s 2(5)(a) and 2(6) of Act 504 had been met, when the panel held as follows:

> [46] We do not think that anyone can seriously dispute that a parent company DDC of its wholly-owned subsidiary DDT would virtually and directly control DDT as it is DDC that decides on who would be its directors sitting in the board of DDT. The requirements of s 2(5) and (6) of the Act have been met ...

[70] However, with all due respect, the provisions under sub-s 2(5) of Act 504 must be read as a whole following the cardinal rule of interpretation of

statutes as decided in *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2018] 2 MLJ 590 (FC).

[71] Under sub-s 2(5) of Act 504, there is a proviso which reads 'provided that *there are grounds* for believing or suspecting that the effect of the relationship is such as to cause the party concerned to behave differently from non-related parties'.

[72] The effect of the proviso can be gleaned in the case of *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345 (FC), where Edgar Joseph Jr FCJ held that:

> Now, the task of construing provisos is not always free from difficulty (see *Gelberg v Miller* [1961] 1 All ER 291 at p 295; [1961] 1 WLR 153 at p 159). *A true proviso is something which qualifies or modifies the section to which it is a proviso*. It must, therefore, be read having regard to the section itself. *Generally speaking, the effect of a proviso is to take out of the section something that would otherwise fall within its ambit.* This principle has been aptly put by Lush J (as he then was) in *Mullins v Treasurer of Surrey* (1880) 5 QBD 170 at p 173 as follows:
>
> > When one finds a proviso to the section, the natural presumption is that but for the proviso the enacting part of the section would have included the subject matter of the proviso.
>
> However, commenting on this dictum, in his book on *Statutory Interpretation* (2nd Ed) at p 494, Mr Francis Bennion says this:
>
> > ... whilst the substance of this dictum is undoubtedly correct, the treatment of the proviso as qualitatively different from the rest of the section is not. *The entire section, including the proviso, is an operative component of the Act* (*Gubay v Kington (Inspector of Taxes)* [1984] 1 WLR 163 per Lord Scarman (dissenting, but not on this point at pp 169–170)).
>
> In *Re Memco Engineering Ltd* [1986] Ch 86; [1985] 3 All ER 267; [1985] 3 WLR 875, Mervyn Davies J said ([1986] Ch 86 at p 98; [1985] 3 All ER 267 at p 274; [1985] 3 WLR 875 at p 883): *'A proviso is usually construed as operating to qualify that which precedes it*'.
>
> A proviso can also be inserted in a statute to make sure that the statute does not have the particular effect that it might have if the proviso were not inserted. (Emphasis added.)

[73] Put simply, a proviso to a section forms part of the said section, which operates to qualify the application of the section that precedes it.

[74] Upon perusal of the judgments of the courts below, the proviso to sub-s 2(5) of Act 504 was never addressed in the courts below. Accordingly, without the grounds for the view that the respondent and DDT are related, sub-s 2(5) of Act 504 cannot therefore be applicable to deem the respondent

and DDT as related parties, the export price cannot thus appear to be unreliable. This is further supported by the finding made by the learned High Court judge that the sales transaction between the respondent and DDT is substantiated with invoices as proof which satisfied the IA that the export price based on the sales transaction is reliable.

[75] As a result of the finding that sub-s 2(5) of Act 504 is not applicable to deem the respondent and DDT as related parties, sub-s 17(2) and 17(3) of the same cannot therefore be applicable to construct the export price on the basis of the price at which the subject merchandise is first resold to an independent buyer, upon the rationale that it is not satisfied that the export price is unreliable when the respondent and DDT are not deemed related. Accordingly, since the export price based on the sales transaction between the respondent and DDT is reliable, the application of sub-s 17(2) of the Act 504 is also precluded as one of the instances for its application is where there is no export price.

[76] Hence, ss 17 and 18 of Act 504 must be read together to ensure fair comparison between export price and normal value which is normally at ex-factory level, in order to promote the underlying intent and purpose of Act 504 which is to protect local industries from unfair trade practices by foreign manufacturers that cause harm to the industry. Subsection 18(1) of the Act 504 provides that a fair comparison shall be made between the export price and the normal value; pursuant to sub-s 18(2) of the same, such comparison shall be made at the same level of trade, normally at ex-factory level, and in respect of sales made at (as nearly as possible) the same time.

[77] As discussed earlier, Act 504 was enacted pursuant to Malaysia's commitment to the GATT, we therefore find it appropriate to make reference to and seek guidance in the Analytical Index of the GATT for the interpretation and application of article VI of the GATT, as follows:

> The Report of the Group of Experts on 'Anti-Dumping and Countervailing Duties' discusses adjustments for differences affecting price comparability:
>
> > The Group first considered the problem of the determination of the normal value or the domestic market price in the exporting or producing country in the light of the definition in paragraph 1(a) of Article VI [price-to-price comparisons]. ... some members of the Group took the view that if there were differences in [quantities sold in the home market and quantities exported] these should be taken into account in order to meet fully the requirement in paragraph 1 of Article VI that 'due allowance shall be made in each case for differences in conditions and terms of sale'. The Group recognised that, while it was logical and reasonable to make adjustments to take account of different quantities and that countries should follow the general principle of adjustments in each case, difficulties might nevertheless arise in securing the necessary information on

A which such adjustments should be based. Furthermore, it was thought that each case had to be considered on its merits in the light of the objective of comparison of like quantities.

The Group further agreed that *in order to effect a true comparison between the export price and the normal value of the product in the home market, countries should aim at a comparison of prices at the same level in the trade — eg, wholesale — and at the same date or dates as near to each other as possible. They should also take into account any such relevant factors as differences in taxation.* …

[78] At this juncture, we also find it appropriate to refer to article 2.4 of the WTO AD Agreement, which similarly requires a fair comparison to be made between the export price and the normal value at the same level of trade, normally at the ex-factory level, and in respect of sales made at, as nearly as possible the same time, as follows:

2.4 *A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time.* Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties. (Emphasis added.)

[79] In the WTO Report of the appellate body of *European Union — Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia,* WT/DS442/R, a discussion was made with regard to fair comparison between the export price and normal value as follows:

5.20. Article 2.4 requires investigating authorities to ensure a fair comparison between the export price and the normal value and, to this end, to make due allowance, or adjustments, for differences affecting price comparability. The obligation to ensure a fair comparison 'lies on the investigating authorities'. However, Article 2.4 does not prescribe a particular methodology by which investigating authorities must satisfy their obligation to ensure a fair comparison.

5.21. The requirement to make a fair comparison, set out in the first sentence of Article 2.4, presupposes that the component elements of the comparison — ie the normal value and the export price — have already been established. The focus of Article 2.4 is not merely on a comparison between the normal value and the export price, but *predominantly on the means to ensure the fairness of that comparison. For a*

comparison to be fair, it must be unbiased, objective, and even-handed. The second sentence of Article 2.4 identifies *basic parameters that further the goal of achieving a fair comparison, requiring investigating authorities to make the comparison at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time.* (Emphasis added.)

[80] Upon consideration of the authorities and materials above, the following proposition of law can be discerned with regard to fair comparison under our s 18 of Act 504 — a fair comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time, in order to effect a true comparison between the export price and the normal value.

[81] Bearing in mind and guided by the proposition of law above, we find no error in the finding made by the learned High Court judge in deciding that the IA had correctly selected the sales transaction between the respondent and DDT to arrive at the export price. Subsequently, as a result of reading ss 17 and 18 of Act 504 together, the export price and normal value must be compared fairly with each other, as could be seen in paras [61] and [62] of Her Ladyship's judgment which is reproduced below:

[61] It can be clearly understood that export price need not be constructed in light of the invoices between the applicant to DDT. Whilst s 17 of Act 504 requires the export price shall be the price actually paid or payable for the subject merchandise, it must be read together with s 18 of Act 504 which requires:

(a) fair comparison to be made between the normal price and the export price; and

(b) the comparison shall be made at the same level of trade ie ex-factory level, and in respect of sales made at as nearly as possible the same time.

This essentially means the normal value and the export price that had been identified by the IA must be compared fairly with each other.

[62] In the instant case should the IA use the price from DDT to Malaysian Importers as the export price, the IA will not be able to arrive at the accurate ex-factory export price as there were sales transactions between the applicant to DDT (at a different level of trade) before the product was sold to Malaysia by DDT. If the price between DDT to Malaysian customers was used, the IA will still have to take into consideration the sales transaction between the applicant to DDT to arrive at the ex-factory export price. (Emphasis added.)

[82] However, the learned High Court judge also held that if the Investigation Authority used the price from DDT to Malaysian Importers as the export price, the IA would not be able to arrive at the accurate ex-factory export price as there were sales transactions between the respondent and DDT. There appears to be a mis-appreciation of the provision and the existence of

s 17(3) of Act 504 on the part of the learned High Court judge here. Section 17(3) of Act 504 provides for allowance to be made for all costs incurred between importation and resale if export price is constructed under s 17(2) of the same, as well as the existence of s 18(3) of the same which provides for due allowance to be made where the normal value and export price as established are not on a comparable basis. The supporting reasons for preceding finding are well elaborated in the WTO Reports discussed below.

[83] In the WTO Report of the Panel of *European Union — Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R, it was held that:

> 7.263 *Nothing in Article 2.4 suggests that the fair comparison requirement provides guidance with respect to the determination of the component elements of the comparison to be made, that is, normal value and export price.* Indeed, in our view, it is clear that *the requirement to make a fair comparison in Article 2.4 logically presupposes that normal value and export price, the elements to be compared, have already been established.* We note in this regard the views of the panel in Egypt — Steel Rebar. Although the issue before that panel was the different question of whether Article 2.4 establishes a 'generally applicable rule' as to burden of proof, the panel considered Article 2.4 in detail, and stated:
>
> > Article 2.4, on its face, refers to the comparison of export price and normal value, ie the calculation of the dumping margin, and in particular, requires that such a comparison shall be 'fair'. A straightforward consideration of the ordinary meaning of this provision confirms that it has to do not with the basis for and basic establishment of the export price and normal value (which are addressed in detail in other provisions), but with the nature of the comparison of export price and normal value. (Emphasis added.)

[84] In the WTO Report of the Panel of *United States — Anti-Dumping Administrative Reviews and other Measures related to Imports of Certain Orange Juice from Brazil*, WT/DS382/R, it was decided that:

> 7.142 We note that the *plain language of the first sentence of Article 2.4 implies that it is concerned with the 'comparison' made between export price and normal value for the purpose of determining a margin of dumping; with the 'fairness' requirement applying precisely to discipline that 'comparison'.* While this requirement can (and should) be understood to inform the rules concerning price comparability issues addressed in the remainder of Article 2.4, we agree with previous panels and the Appellate Body that this does not exhaust its relevance. First, it is significant that the 'fair comparison' requirement is stated in a separate sentence at the beginning of the provision. In this light, to read it as simply repeating the requirements that follow would render the first sentence of Article 2.4 redundant. Secondly, unlike Article 2.4.2, which is explicitly limited to the 'investigation phase', the application of Article 2.4 is not constrained to any particular anti-dumping proceeding. It follows that the entirety of Article 2.4, including its first sentence, must apply to discipline the 'comparison' between export price and normal value whenever undertaken during an anti-dumping proceeding, including during duty assessment.

...

7.152 We agree with the United States and the panel in US — Softwood Lumber V (Article 21.5 — Canada) that *the meaning of the notion of 'fairness' as it is articulated in Article 2.4 will depend upon the particular context in which it is intended to operate.* In our view, the search for this context must, first and foremost, start with understanding precisely *what it is that must be 'fair'. This, of course, is the 'comparison' between export price and normal value.* Thus, contrary to the United States' argument, accepting that the scope of the 'fair comparison' requirement extends beyond the subject matter of Article 2.4, does not establish a rule governing 'any and all anti-dumping calculations'. *The very language of the first sentence of Article 2.4 explicitly limits its relevance to situations involving the 'comparison' between export price and normal value. For instance, the 'fair comparison' requirement does not extend to govern how an investigating authority establishes normal value.* It is clear that this is comprehensively disciplined under Article 2.2 of the AD Agreement. *Neither does the 'fair comparison' requirement regulate how to establish constructed export price*, which is addressed in Article 2.3 of the AD Agreement. However, pursuant to the first sentence of Article 2.4, the 'comparison' between any export price and normal value, both individually established in accordance with the specific rules set out in Article 2, must be 'fair'. (Emphasis added.)

[85] The applicable principles as ascertained and perceived from the WTO Reports above are as follows:

(a) under s 18(1) of Act 504, the requirement to make a fair comparison presupposes that the component elements of the comparison, namely the normal value and the export price, have already been established;

(b) sub-s 18(1) of Act 504 is concerned with the comparison made between export price and normal value for the purpose of determining a margin of dumping; with the 'fairness' requirement applying precisely to discipline that comparison;

(c) it is the comparison between export price and normal value that must be fair, and it explicitly limits its relevance to situations involving the comparison between export price and normal value; and

(d) it certainly does not extend to govern how the IA establishes normal value, nor does it regulate how to establish constructed export price.

[86] In the present appeal, the learned High Court judge appeared to read ss 17 and 18 of Act 504 together to suggest that reaching an export price at ex-factory level is necessary and if the IA chose the price from DDT to the Malaysian importers as the export price, an accurate ex-factory export price would not be established. The principles ascertained above however does not warrant such construction between ss 17 and 18 of Act 504.

[87] For all intent and purposes, ss 17 and 18 of Act 504 are to be read

A together for their proper application, where the component elements of export price and normal value must be first established before a fair comparison can be made; s 17 of the same provides for the establishment of export price whereas s 18 of the same is concerned with the fair comparison between export price and normal value.

B

[88] It therefore follows that not only did the learned High Court judge seemed to have misconstrued the ss 17 and 18 of Act 504, so did the Court of Appeal when it appeared to suggest that there could only be fair comparison if a constructed export price was established on the basis of the price to the C independent buyer, as could be seen in the following passages extracted from the Court of Appeal judgment:

> [62] As the Malaysian importer is an independent buyer, there is no suggestion of price fixing or price fiddling. Whether the exporter sells at a profit or at a loss for reasons such as to injure or kill the domestic market of Malaysia or to gain market D share in Malaysia, *the 'selling price' to the independent buyer is the base from which one starts working backwards to come to a constructed 'export price'.*
>
> [63] *Only then can there be 'a fair comparison made between the 'export price' and the 'normal value' as required under s 18(1) of the Act.* The learned High Court judge E appeared to have misconstrued this need to work backwards from an arm's length selling price when the first resale was made to an independent buyer in Malaysia when she expressed her concerns if she did not take the price at which DDC sold to DDT as the 'export price'. (Emphasis added.)

F **[89]** With all due respect, it must be borne in mind that, in applying sub-s 18(1) of Act 504, it is the 'comparison' that must be fair, and the requirement of fairness does not in any way extend to the establishment of export price, which is duly provided under s 17 of the same. Sections 17 and 18 of Act 504 must be read together to uphold the object and intent of Parliament G to ensure fair comparison between export price and normal value which is normally at ex-factory level within their permissible limits and restrictions without encroaching into the field of another.

[90] Given the aforesaid, premised upon the grounds and reasons discussed H earlier, we answered question 1 in the affirmative whereas question 2 is answered in the negative.

Question 5

I **[91]** Question 5 deals with the issue of whether in making a price comparison pursuant to s 18 of Act 504 and reg 32 of the CADDR 1994 between the export price and normal value, adjustment had to be made even though no cost was borne by the respondent in the domestic market with respect to duty drawback.

[92] We reproduced reg 32 of the CADDR 1994 for clarity:

32 *Adjustments to ensure of fair comparison between normal value and export price*

(1) The Government will make the following adjustments to ensure a fair comparison between the normal value and the export price of a merchandise:

(a) the Government will make reasonable allowances for transport expenses such as freight, shipping, insurance or other similar expenses to ensure the prices are comparable normally at an ex-factory level;

(b) the Government will make reasonable allowances for differences in the physical characteristics of merchandise compared if the Government is satisfied that the amount of any price difference is wholly or partly due to such physical differences;

(c) the Government will make reasonable allowances for a bona fide difference in the selling conditions of the sales compared if the Government is satisfied that the amount of any price difference is wholly or partly due to such differences in the selling conditions such as commissions, credit terms, guarantees, warranties, technical assistance and servicing;

(d) the Government will make reasonable allowances for differences in selling costs incurred by the producer or reseller but only to the extent that such costs are assumed by the producer or reseller on behalf of the purchaser;

(e) the Government will calculate normal value and export price based on comparable quantities of merchandise, but where the quantities are not comparable and the Government is satisfied that the amount of any price difference is wholly or partly due to such difference in quantities, the Government may make a reasonable allowance for the difference;

(f) the Government will calculate normal value and export price based on sales at the same commercial level of trade, but where the levels of trade are different and the Government is satisfied that the amount of any price difference is wholly or partly due to such difference, the Government may make a reasonable allowance for the difference;

(g) the Government will make any other adjustments it deems necessary to ensure a fair price comparison.

(2) Any price used to establish either normal value or export price shall be net of all discounts and rebates directly linked to the sales under consideration, provided that the exporter furnishes sufficient evidence that any such reduction from the gross price has actually been granted.

(3) The Government may recognise deferred discounts if they are directly linked to the sales under consideration and if evidence is produced to show that the discounts were based —

(a) on consistent periods; or

(b) on an undertaking to comply with the conditions required to qualify for the deferred discount.

(4) The Government may disregard adjustments to normal value or export price which are insignificant in nature. (Emphasis added.)

[93] The Court of Appeal was of the view that there was a necessity to add the duty drawback to the respondent's export price when making adjustment to calculate its dumping margin in order to ensure that the duty drawback regime does not result in the finding of dumping margin.

[94] It was held that the exemption of import duties on raw materials which is the drawback were only available on condition that the Rebar were exported through the Turkish Inward Processing Regime, and therefore the respondent's domestic sales of the subject merchandise did not enjoy similar duty drawback as the import duties for raw materials was imposed on them with respect to the product sold in the domestic market. In a nutshell, the duty drawback facility was granted due to export performance.

[95] The Court of Appeal then found that a wrong dumping margin was arrived at when the IA failed to add the duty drawback to the export price to allow for an 'apples-to-apples' comparison to the normal value, by misconstruing and not applying s 18 of Act 504 to arrive at a fair comparison between the constructed export price and the normal value, as follows:

[74] In the High Court below one of the grounds of complaint of the applicant DDC was that there was no proper adjustments made to the duty drawback granted by the Turkish authorities for its Rebar export sales by adding the value of the duty drawback when calculating the Dumping Margin when both article 2.4 of the WTO AD Agreement and s 18 of the Act provide for it.

[75] We are also persuaded that the duty drawback should be allowed under s 18 of the Act as there is sufficient basis for the applicant to say that the import duties for raw materials was imposed on them with respect to the product sold in the domestic market. The learned High Court judge seemed to have inadvertently missed out on addressing the applicant's submission in this ground of challenge in the judicial review application.

...

[78] We are satisfied that *DDC in its questionnaire response had clearly stated with documentary evidence that the exemption of import duties on raw materials which is the drawback were only available on the condition that the Rebar were exported through the Turkish Inward Processing Regime ('IPR'). Thus, DDC's domestic sales of the subject merchandise does not enjoy similar duty drawback.* This information was duly verified by the IA. As such due adjustment must be made to take into consideration the duty drawback which the respondents refused to.

[79] Support for this proposition is found in a leading textbook Modern GATT Law, A Treatise on the Law and Political Economy of the General Agreement on Tariffs and Trade and other World Trade Organisation Agreements (Vol II) (2nd Ed) in two volumes by Raj Bhala where the author set out the common adjustments

that must be taken into account in an anti-dumping investigation, including the need to add duty drawback value to 'export price' (because duty drawback is not available for the like product sold in the exporter's domestic market) ...

...

[80] *We agree that the necessity to add the duty drawback value to DDC's export price when making adjustment to calculate its Dumping Margin is to ensure that the duty drawback regime does not result in the finding of Dumping Margin* because article VI.4 of GATT provides as follows:

> No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes. (Emphasis added.)

[81] We appreciate the argument of learned counsel for the applicant that whilst the IA acknowledged that *'the duty drawback facility was granted due to export performance' it nevertheless did not see it proper and necessary to make due adjustment or allowance by adding the duty drawback value to the 'export price' to allow for an 'apples-to-apples' comparison to the 'normal value'.*

[82] The IA had not seen it necessary to add the duty drawback though it appreciated that the same merchandise for domestic consumption in the country of origin does not enjoy such duty drawback. By misconstruing and not applying s 18 of the Act to arrive at a fair comparison between the constructed 'export price' and the 'normal value', an error of law had arisen and a wrong Dumping Margin had been arrived at. Therefore, the AD Duties imposed had to be quashed and set aside. (Emphasis added.)

[96] In the WTO Report of the Panel of *European Union — Anti-Dumping Measures on Certain Footwear from China,* WT/DS405/R, it sought to shed some light on the interpretation of article 2.4 of the WTO AD Agreement which is similar to our sub-s 18(3) of Act 504 in relation to due adjustment as follows:

> Article 2.4 requires, as discussed above, that a 'fair comparison' be made between the normal value and the export price. To this end, the comparison should be made at the same level of trade and with respect to sales made at as nearly as possible the same time. In addition, *Article 2.4 mandates that 'due allowance' shall be made for 'any' difference between normal value and export price which is 'demonstrated' to affect 'price comparability'.* However, Article 2.4 does not set out any methodological guidance as to how due allowance for differences affecting price comparability is to be made. This, in our view, implies that, subject to the obligation to ensure a 'fair comparison', the investigating authority may make any necessary 'due allowance' according to whatever methodology it considers suitable in this respect.
>
> 7.278 Moreover, it is clear to us that while Article 2.4 places the obligation to ensure a fair comparison on the investigating authority, *it places an obligation on interested parties to make substantiated requests for 'due allowance', whether in the form of*

adjustments or otherwise, demonstrating that there is a difference affecting price comparability. It follows therefore, that in order to make a prima facie case of violation of Article 2.4, *a complaining party must demonstrate that due allowance should have been made with respect to (i) a difference (ii) that was demonstrated to affect price comparability between the normal value and the export price and (iii) that the investigating authority failed to make the adjustment.*

7.279 We understand that, in order to comply with the requirement of Article 2.4 to make due allowance for differences affecting price comparability, investigating authorities may divide products into groups or categories of goods sharing common characteristics within the like product, and make comparisons of normal value and export price for these comparable groups of goods, as part of their determination of dumping. Alternatively, investigating authorities may make adjustments for differences affecting price comparability with respect to each export and normal value price to be compared. Or investigating authorities may use a combination of these two approaches, or some entirely different methodology. Any of these methods may satisfy the Article 2.4 requirement that 'due allowance' be made for differences demonstrated to affect price comparability, in order to ensure a fair comparison. We see nothing in Article 2.4 that limits the range of methodological options for investigating authorities in comparing normal value and export price, *subject always to the requirement that the comparison actually made must satisfy the fundamental requirement of Article 2.4 that it be a 'fair comparison', in which 'due allowance' is made for differences demonstrated to affect price comparability.* (Emphasis added.)

[97] Therefore, by way of analogy, sub-s 18(3) of Act 504 necessarily entails the following interpretations of its application:

(a) it mandates that due allowance shall be made for any difference between normal value and export price which is demonstrated to affect prices and price comparability;

(b) in places the obligation to ensure a fair comparison on the IA, it places *an obligation on interested parties to make substantiated requests* for due allowance demonstrating that there is a difference affecting prices and price comparability. Such parties must *demonstrate* that due allowance should have been made with respect to: (i) a difference; (ii) that was demonstrated to affect price comparability between the normal value and the export price; and (iii) that the investigating authority failed to make the adjustment; and

(c) the comparison actually made must satisfy the fundamental requirement of sub-s 18(1) of Act 504 that it be a fair comparison, in which due allowance is made for differences demonstrated to affect prices and price comparability.

[98] In the courts below, the respondent submitted that it had stated in its questionnaire response that the exemption of import duties of raw material was

only available on the condition that the Rebar were exported through the Turkish Inward Processing Regime, and that its domestic sales did not enjoy similar duty drawback. The relevant passages in the questionnaire response are reproduced below:

> Under Turkey's 'Inward Processing Regime' ('IPR'), a company that imports raw materials and exports finished goods made from such raw materials may obtain an inward processing certificate ('IPC') (Turkish acronym, DIB). An IPC sets forth the quantity of raw material allowed to be imported without cash deposit of import duties under a given IPC and the quantity of export required to close the IPC, ie, to satisfy the export-commitment requirements of the IPC. When an IPC has been closed, and the closure is approved by Turkish Customs, then the IPC holder is released of any liability for import duties otherwise payable on the entries under the IPC. The final approval of IPC closures is within the jurisdiction of the Turkish Ministry of Economy.
>
> When a Turkish company imports or exports goods, it files an entry or exit declaration, respectively, with Turkish Customs. Customs verifies the accuracy of such declarations and inserts the finalised quantities, values, and related information, including IPC numbers, into a Customs database. A holder of an IPC can then query the Turkish Customs database, via an internet e-portal, to ascertain its import and export movements under its IPCs. IPC holders can also download their IPC usage tables from the Customs e-portal.
>
> Generally, Diler imports ferro alloys, scrap and billet from various countries in significant quantities with a commitment to export the finished product that is manufactured by using the imported raw materials. *Upon import, Diler is exempted from paying import duties, charges and VAT on the condition that the finished products will be exported.* According to the IPR, failure to demonstrate that the finished goods are exported would result in retroactive collection of all the imported customs duties and value added tax as well as fines.
>
> ...
>
> To calculate the per unit duty drawback Diler followed the steps below:
>
> > Diler uses Ministry of Economy's online IPR system to make application concerning the opening and closing of a certificate and to submit all of the requested data and information to the Government. Therefore, Diler used this online system to identify the IPCs included in the calculation. Diler included all IPCs, relevant with Malaysia sales, under which imports or exports were made during the POI.
>
> After identifying the IPCs; Diler extracted all imports and exports under each certificate from the online system. After compiling the import data, Diler created the 'duty drawback calculation' worksheet provided in Exhibit E-3a. Diler calculated the reported per unit amount of duty drawback by dividing total amount of import duties and charges corresponding to the imports made under the included IPCs by the total exports made as a commitment against the imports to close the IPCs. This unit duty drawback adjustment has been reported in DOM-SALE, as requested. This adjustment should be deducted from the domestic price similar to

A other allowances. This adjustment should [sic] made in accordance with Article VI.4 of the GATT. ... (Emphasis added.)

B **[99]** The appellants in their written submission argued that the IA cannot consider the adjustment for duty drawback as the respondent was exempted from the imposition of import duty on raw materials based on the Turkish Inward Processing Regime. Pursuant to the Uplifted Documents During Verification Visit, the respondent had also informed that an exemption from import duty due to the company export performance was granted. Referring to the Final Determination Report dated 7 January 2020, the drawback facility is C applicable for raw materials used to produce the subject merchandise which is solely for export purposes. On the basis that there was no cost borne by the respondent, the IA did not make any adjustment to the export price by taking into account duty drawback in determining the dumping margin. The relevant D passages in the Final Determination Report are reproduced below:

Adjustment for Duty Drawback should be made

44. Colakoglu Metalurji A.S. and Diler Iron and Steel Co. Inc. claimed that adjustment for duty drawback should be made in accordance to Article VI.4 of GATT.

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IA's Response

45. Any request for adjustment shall be subjected to verification visit. The on-site verification visits at the premises of both companies have been conducted from 14 to 22 October 2019.

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46. In relation to Article VI.4 of GATT, to note that *the duty drawback facility granted to both companies is applicable for raw materials used to produce the subject merchandise that is solely for export purposes.*

47. The calculation of the dumping margin was determined in accordance with G Article 2.4 of the WTO ADA, Section 18 of the Act and Regulation 32 of the Regulations. In this regard, *to arrive at ex-factory price the IA cannot consider the adjustment for duty drawback as both companies were exempted from imposition of import duty on raw materials based on the Turkish Government's Inward Processing Regime (IPR)*. (Emphasis added.)

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[100] With all due respect, we are of the view that the appellants submissions were misconceived, where it appears that the appellants had confusingly taken the exemption from imposition of import duty on raw materials based on the Turkish Inward Processing Regime to be applicable to the respondent's I domestic market. In this respect, after perusal of the questionnaire response above, we find ourselves on the same page with the Court of Appeal below on the point that the exemption of import duties on raw materials which is the drawback were only available on the condition that the Rebar were exported through the Turkish Inward Processing Regime, and therefore the respondent's

domestic sales of the subject merchandise did not enjoy similar duty drawback as the import duties for raw materials were imposed on them with respect to the product sold in the domestic market.

[101] As guided by the principles enunciated above, sub-s 18(3) of Act 504 places not only the obligation to ensure a fair comparison on the IA but also an obligation on the respondent to make substantiated requests for due allowance demonstrating that there is a difference affecting prices and price comparability. Most importantly, the respondent must demonstrate that due allowance should have been made with respect to a difference that was demonstrated to affect price comparability between the normal value and the export price.

[102] Upon perusal of the submissions of the respondent in the courts below, it does not seem to indicate any demonstration made with respect to a difference affecting prices and price comparability. In other words, demonstration does not seem to have been made as to how the difference as claimed affects the prices and price comparability.

[103] In the WTO Report of the Panel of *Korea — Anti-Dumping Duties on Imports of Certain Paper from Indonesia,* WT/DS312/R, it was held that a mere claim or mere existence of such differences is not sufficient to satisfy the obligation or burden on the part of the interested party for such adjustment to be made. The relevant passages are reproduced below:

> 7.146 The crux of Indonesia's claim, and the main line of reasoning put forward by the Sinar Mas Group in the course of the investigation at issue, is that the involvement of CMI in the domestic sales chain necessarily meant that an adjustment should have been made to make a fair comparison. The fact that CMI charged a [[**]] over the prices of Indah Kiat and Pindo Deli is, in Indonesia's view, evidence of this fact. Evidence on which Indonesia relies in this regard has also to do with the involvement of CMI in domestic sales. For instance, Indonesia refers to the fact that CMI had to pay its employees who were carrying out sales-related work in addition to the work done by the employees of Indah Kiat and Pindo Deli. Indonesia also mentions that there were two price negotiations in domestic sales: One between Indah Kiat or Pindo Deli and CMI and the other between CMI and independent buyers. Consequently, two sets of sales-related documents were issued with respect to domestic sales. That is why CMI charged a [[**]] and why the KTC added SG&A and interest expenses for CMI in the constructed normal values for Indah Kiat and Pindo Deli.
>
> 7.147 We note that *in a given investigation there may be differences with respect to sales-related expenses in the export and domestic markets for a variety of reasons. It may also be the case that these differences may affect price comparability. If so, the IA has to make an adjustment to account for the effect of such differences in order to ensure a fair comparison between the normal value and the export price*, consistently with Article 2.4 of the Agreement. This may be the case irrespective of whether or not there is a

> trading company, such as CMI in this investigation, involved in the distribution of the subject product either in the export or the domestic market. *In other words, the fact that a trading company handles domestic or export sales of the subject product does not in and of itself mean that there is a difference that affects price comparability and that an adjustment has to be made under Article 2.4. The interested party claiming such an adjustment has to demonstrate that the involvement of the trading company gives rise to a difference that affects price comparability. We note that, just as the Sinar Mas Group did during the investigation at issue, in these proceedings Indonesia repeatedly referred to the costs incurred by CMI as the trading company handling domestic sales of Indah Kiat and Pindo Deli. This, in our view, is not enough to demonstrate that CMI's involvement created a difference between the normal values and the export prices of Indah Kiat and Pindo Deli which affected price comparability.* We are not convinced that there were sales-related services rendered by CMI with respect to domestic sales of Indah Kiat's and Pindo Deli's products in the Indonesian market which were not rendered in these two companies' export sales to Korea. Indonesia has failed to make a prima facie case in this regard. We therefore reject Indonesia's claim. (Emphasis added.)

[104] The relevant principle from which may be distilled from above provides that the existence of differences may be due to a variety of reasons, an adjustment to account for the effect of such differences may only be made if such differences affect the price compatibility. It boils down to the essential obligation on the part of the interested party claiming such an adjustment to demonstrate that such differences affect price comparability. A mere claim or mere existence of such differences is not sufficient to satisfy the obligation or burden on the part of the interested party for such adjustment to be made.

[105] Referring to the WTO Report of the Appellate Body of *United States — Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan,* WT/DS184/AB/R, which sought to provide explanation of article 2.4 as follows:

> 177. Article 2.4 of the Anti-Dumping Agreement provides that, *where there are 'differences' between export price and normal value, which affect the 'comparability' of these prices, '[d]ue allowance shall be made' for those differences.* The text of that provision gives certain examples of factors which may affect the comparability of prices: 'differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences'. However, *Article 2.4 expressly requires that 'allowances' be made for 'any other differences which are also demonstrated to affect price comparability'* (emphasis added) There are, therefore, no differences 'affect[ing] price comparability' which are precluded, as such, from being the object of an 'allowance'. (Emphasis added.)

[106] Similarly, in the WTO Report of the Appellate Body of *United States — Laws, Regulations and Methodology for Calculating Dumping Margins ('Zeroing'),* WT/DS294/AB/R, it was observed that:

156. We begin our analysis with the question whether the third sentence of Article 2.4 implies that due allowance should not be made for differences that do not affect price comparability. In our view, *if allowances could be made for differences not affecting price comparability, the purpose of the requirement of the third sentence of Article 2.4 would be undermined.* Therefore, we are of the view that the third sentence of Article 2.4 also applies a contrario: this sentence implies that allowances should not be made for differences that do not affect price comparability. Having said that, *the principle set out in the third sentence of Article 2.4, including its a contrario application, does not cover all adjustments, but only adjustments made for those differences that fall within the scope of that principle*.

157. … Article 2.4 specifies that *the differences for which due allowance shall be made are those 'which affect price comparability'.* In our view, *this refers to differences in characteristics of the compared transactions that have an impact, or are likely to have an impact, on the price of the transaction. Likewise, the a contrario application of this principle prohibits only those adjustments made in relation to differences in characteristics of the compared transactions that do not affect price comparability.* These are differences that do not have an impact, or are unlikely to have an impact, on the price of the transaction. Therefore, adjustments or allowances made in relation to differences in price between export transactions and domestic transactions—such as zeroing— cannot be adjustments or allowances covered by the third sentence of Article 2.4, including its a contrario application. Indeed, whether or not a factor affects the price comparability between export and domestic transactions should be determined before this comparison is made, and not after. (Emphasis added.)

[107] Moreover, in the WTO Report of the Panel of *Dominican Republic — Anti-Dumping Measures on Corrugated Steel Bars,* WT/DS605/R, it further explains the scope of exporter's obligation in respect of due allowance under article 2.4 of the WTO AD Agreement, as follows:

7.22. Article 2.4 requires the investigating authorities to make a 'fair comparison' between the export price and the normal value when determining dumping and when calculating the dumping margin. The word 'equitativo' ('fair') means that something has the quality of 'equidad' ('fairness'), ie '[d]isposición del ánimo que mueve a dar a cada uno lo que merece' ('[s]tate of mind that moves one to give everyone their due'). Article 2.4 sets forth certain requirements that must be complied with in order to ensure that the comparison is fair. The second sentence of Article 2.4 provides that the comparison should be made 'at the same level of trade' and 'with respect to sales made at as nearly as possible the same time'. The third sentence of Article 2.4 requires that investigating authorities make '[d]ue allowance … in each case, on its merits, for differences which affect price comparability'.

7.23. *We understand that the relevant differences are the differences in the characteristics of the compared transactions that have an impact, or are likely to have an impact, on the price of the transactions, as already mentioned.* Moreover, when it is established that the comparison between the export price and the normal value is made 'in respect of sales made at as nearly as possible the same time', we consider that the date of sales may have an impact on the comparability of export and home market transactions.

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7.24. The requirement to make due allowance for differences which affect price comparability means that the authority must evaluate the differences identified. The last sentence of Article 2.4 requires that investigating authorities indicate to the parties in question what information is necessary to ensure a fair comparison. Investigating authorities must thus indicate what information they will need in order to make a fair comparison. In addition, we recall that the last sentence of Article 2.4 requires that investigating authorities 'not impose an unreasonable burden of proof on those parties'.

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7.25. *We understand that exporters, for their part, bear the burden of substantiating, as constructively as possible, their requests for adjustments under Article 2.4.*

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7.26. Lastly, we agree that *the existence of one of the differences listed in Article 2.4 does not automatically mean that price comparability has been affected, as there may be situations when those differences do not have an impact on price comparability.* (Emphasis added.)

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[108] In the WTO Report of the Panel of *Pakistan — Anti-Dumping Measures on Biaxially Oriented Polypropylene Film from the United Arab Emirates*, WT/DS538/R, it was held that the investigating authorities are entitled to reject adjustment if exporters fail to demonstrate the existence of a difference

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that affects price comparability:

7.201. Although investigating authorities are under the obligation to ensure that the comparison is fair, we agree with the Appellate Body and panels in previous disputes that 'exporters bear the burden of substantiating, 'as constructively as possible', their requests for adjustments' under Article 2.4. Therefore, *if exporters request an adjustment but fail to demonstrate the existence of a difference that affects price comparability, the investigating authorities are entitled to reject the requested adjustment.* At the same time, the investigating authorities 'must take steps to achieve clarity as to the adjustment claimed and then determine whether and to what extent that adjustment is merited'. (Emphasis added.)

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[109] In the WTO Report of the Panel of *Morocco — Definitive Anti-Dumping Measures on School Exercise Books from Tunisia,* WT/DS578/R, it also held that there is no obligation for the authority to make an adjustment if the exporters fail to substantiate as constructively as possible their requests for

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adjustments:

7.114. This article focuses on the comparison between the normal value and the export price and contains the requirements enabling an investigating authority to ensure a 'fair' comparison. In particular, it provides that the investigating authority shall, in its comparison, 'make allowance' for differences which affect the 'comparability' between the normal value and the export price. Article 2.4 does not prescribe a specific methodology for making allowance for such differences and therefore leaves the authorities the choice to classify the product under investigation by types presenting the same characteristics and/or to make the necessary adjustments when making the comparison.

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7.115. Article 2.4 also allocates the burden of proof between the interested parties and the investigating authority in order to make allowance for differences affecting price comparability. A

7.116. Thus, *the obligation to ensure a 'fair comparison' is [sic] lies on the investigating authorities and it is therefore up to them to 'make allowance' for differences when making a comparison. However, it is up to the party seeking an adjustment to 'demonstrate' that there is a difference and that it affects price comparability.* Therefore, in other dispute settlement proceedings, *exporters were found to bear the burden of substantiating, 'as constructively as possible', their requests for adjustments. Failing this, there is no obligation for the authority to make an adjustment.* In turn, the last sentence of Article 2.4 further states that the authorities shall nevertheless indicate to the parties what information is necessary to ensure a fair comparison, without imposing an 'unreasonable' burden of proof on those parties. B C

7.117. This process, which is likely to continue throughout the investigation, has been described as a 'dialogue' between the authority and interested parties. The distribution of the burden of proof between the authority and the interested parties is the same, regardless of the method used by the authority to 'make allowance' for differences affecting price comparability. Article 2.4 does not differentiate in this regard between whether the investigating authority uses — for the purposes of comparability — a typology of models or makes adjustments at the comparison stage. (Emphasis added.) D E

[110] Moving on, the WTO Report of the Panel of *European Union — Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia,* WT/DS442/R, had provided a more comprehensive discussion of the scope of article 2.4 of the WTO AD Agreement as follows: F

7.57. Prior panel and Appellate Body reports have provided guidance on how to determine whether an alleged factor constitutes a 'difference which affects price comparability' for which an allowance must be made under Article 2.4 of the Anti-Dumping Agreement. For instance, the Appellate Body stated in US–Zeroing (EC) that: G

> The illustrative list in the third sentence of Article 2.4 provides indications as to the nature of the differences covered by the principle set out in that sentence, which refers to differences that include 'differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics'. The elements of this list are all features, or characteristics, of the transactions that are compared. Although the list is illustrative and not exhaustive, it suggests that the adjustments, or allowances, covered by the third sentence are those that are made to take into account the differences relating to characteristics of the compared transactions (export transactions and domestic transactions). Article 2.4 specifies that the differences for which due allowance shall be made are those 'which affect price comparability'. In our view, this refers to differences in characteristics of the compared transactions that have an impact, or are likely to have an impact, on the price of the transaction. H I

A 7.58. We derive from this that the factors referred to in Article 2.4 are 'features', 'characteristics' or 'identifiable components' of the transactions and prices in question that have, or are likely to have, an impact on the comparison of those prices. We also understand that such factors must give rise to a 'difference' between the normal value and export prices being compared such that those prices are not B fairly comparable unless an allowance is made. As recognised by the panels in EU — Biodiesel (Argentina) and US — Softwood Lumber V, this aspect of the legal standard could be satisfied by evidence that the 'feature', 'characteristic' or 'identifiable component' of the prices in question is linked exclusively either to the domestic sales or to relevant export sales subject to comparison, or to both sides of C the comparison but in different amounts. *Conversely, if an alleged factor does not represent a difference affecting the comparability between the normal value and export prices, no allowances are permitted pursuant to the third sentence of Article 2.4.*

7.59. Beyond this, the Appellate Body and panels have recognised on a number of occasions that Article 2.4 does not prescribe a specific methodology for how to D achieve a 'fair' comparison. For instance, the panel in US — Softwood Lumber V stated that:

> Bearing in mind the text of Article 2.4, we consider that this provision does not impose on investigating authorities any particular method for examining whether any given difference affects price comparability.
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> E ...
>
> 7.61. We also consider it relevant to our analysis in the present case that the EU authorities made the downward adjustment for an identified difference affecting price comparability of their own volition based on a provision in the governing F regulation. This aspect differentiates our analysis from the evidentiary assessment of alleged differences affecting price comparability by past panels. In particular, past panels have assessed whether interested parties provided sufficient evidence to justify an allowance for differences affecting price comparability (or, at least, to require an investigating authority to take steps to achieve clarity in respect of the alleged difference). In that regard, the Appellate Body has stated that *'exporters bear* G *the burden of substantiating, 'as constructively as possible', their requests for adjustments reflecting the 'due allowance' within the meaning of Article 2.4'*. According to the Appellate Body, *'[i]f it is not demonstrated to the authorities that there is a difference affecting price comparability, there is no obligation to make an adjustment'. In these instances, the burden lay with the relevant interested party to demonstrate the existence* H *of a difference affecting price comparability.* In contrast, our assessment focuses on whether the EU authorities themselves had sufficient evidence to justify an allowance for a difference affecting price comparability, taking into account the argumentation and evidence provided by interested parties in rebuttal. (Emphasis added.)

I **[111]** Premised upon the discussion of various authorities above, the relevant principles in relation to sub-s 18(3) of Act 504 which must be borne in mind are ascertained as follows:

(a) it specifies that the differences for which due allowance shall be made are

those which affect prices and price comparability, which refers to differences in characteristics of the compared transactions that have an impact, or are likely to have an impact, on the price of the transaction. Likewise, it prohibits those adjustments made in relation to differences in characteristics of the compared transactions that do not affect prices and price comparability;

(b) the exporters bear the burden of substantiating, as constructively as possible, their requests for adjustments, they must demonstrate that there is a difference and that it affects prices and price comparability. The existence of the differences does not automatically mean that price comparability has been affected, as there may be situations when those differences do not have an impact on price comparability. If the exporters fail to demonstrate the existence of a difference that affects price comparability, the investigation authorities are entitled to reject the requested adjustment; there is no obligation to make an adjustment; and

(c) if an alleged factor does not represent a difference affecting the comparability between the normal value and export price, no allowances are permitted under sub-s 18(3) of Act 504.

[112] Following the finding above, that demonstration does not seem to have been made as to how the difference as claimed affects the prices and price comparability, the respondent failed to discharge the burden of substantiating, as constructively as possible, the request for adjustments, by demonstrating that it affects price comparability. It must be emphasised that the existence of the differences does not automatically mean that price comparability has been affected.

[113] As a consequence, even though domestic sales of the subject merchandise did not enjoy similar duty drawback, the mere existence of the duty drawback for raw materials used to produce the subject merchandise that is solely for export purposes does not automatically mean that price compatibility has been affected.

[114] Thus, such factor does not represent a difference affecting the comparability between the normal value and export price, and no allowances are therefore permitted under sub-s 18(3) of Act 504. In this regard, question 5 ought to be answered in the negative.

CONCLUSION

[115] In summary, our answers to the questions of law posed are as follows:

Question 1: Affirmative.

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Question 2: Negative.

Question 5: Negative.

B

We find it unnecessary to answer questions 3 and 4.

[116] Given the aforesaid, we unanimously allowed the appeal with no order as to costs.

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Appeal allowed with no order as to costs.

Reported by Nabilah Syahida Abdullah Salleh

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